In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-919

JOE ROSATO, WILLIAM K. PATTERSON, GEORGE F. GRUNER and JIM BORT,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO,

Respondent.

Petition for Writ of Certiorari

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To The Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by Joe Rosato, William K. Patterson, George F. Gruner and Jim Bort for a Writ of Certiorari to review a judgment of the Court of Appeal of the State of California for the Fifth Appellate District. [*Rosato v. Superior Court*, 51 Cal.App.3d 190, 124 Cal.Rptr. 427 (1975); see attached Exhibit "A".]

I. ACTION TAKEN IN COURTS BELOW

Suit below was instituted when petitioners filed a Petition for Writ of Certiorari in the Court of Appeal for the State of California, Fifth Appellate District, praying for annulment of contempt judgments entered against them in the respondent court in April, 1975. In its opinion filed and entered September 8, 1975, the Court of Appeal overturned eighteen of the judgments and remanded the case to the Fresno County Superior Court for sentencing in accord with its decision. Thereafter, a Petition for Hearing was filed with the Supreme Court of California. The order denying that petition was dated November 20, 1975. See attached Exhibit "B".

II. JURISDICTION

The statutory provision conferring jurisdiction upon this Court to review the said Court of Appeal's judgment of September 8, 1975, is Judicial Code § 1257(3), 28 U.S.C. § 1257(3).

III. QUESTIONS PRESENTED

The questions requiring review are as follows:

1. Whether pre-trial gag orders that operate as broad prior restraints on pre-trial publicity in a pending criminal case are invalid on their face when entered without any consideration whatever as to whether any prejudice would result to the criminal defendants or otherwise interfere with a fair trial; and, if invalid, by which among the differing constitutional standards applied by the Courts of Appeal should the courts be guided in constitutionally fashioning such restrictive orders.

2. Whether the refusal of a newsman to disclose the confidential source of information used in news articles

referring to sealed grand jury testimony is protected by the First Amendment when no criminal defendant's Sixth Amendment right to a fair trial was prejudiced by the information published, and no violation of the court's gag order was involved because the newsman's source was not a court officer, attaché or employee covered by such order.

3. Whether a court may ignore a broad state legislative enactment granting newsmen absolute protection against forced disclosure of confidential news sources and other unpublished information which constitutes a state legislative finding of fact conclusively establishing that protection of news sources is the paramount state interest to be served whenever such protection comes into potential conflict with other state interests such as that of a state trial court in investigating the possible violation of its orders.

4. Whether summary judgments of contempt are constitutionally invalid when the alleged contemnor, though under subpoena to testify at a judge-initiated investigation of a possible court order violation is, in fact, assumed by the court to have committed an unlawful act, the punishment for which through the court's contempt power is the real object of the investigation, and in the process of that proceeding the alleged contemnor is denied (1) specific notice of the purpose of the hearing, (2) time to prepare a defense, and (3) the opportunity both to confront and cross-examine witnesses and to call his own witnesses to refute the court's insinuation, both from the bench and on television, of his misconduct.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The arguments in this petition are based upon the Free Press clause of the First Amendment and upon the rights enumerated in the Fifth and Sixth Amenments, all as they

apply by force of the Fourteenth Amendment to the Constitution of the United States.

V. STATEMENT OF THE CASE

Following the indictment by the Fresno County Grand Jury of a Fresno City Councilman, a former Planning Commissioner and a land developer on charges of conspiracy and bribery, the defendants moved the respondent court on November 22, 1974, for an order sealing the transcript until the conclusion of the trial and an Order Re Publicity or "gag order." Copies of each order are attached hereto as Exhibits "C-1" and "C-2", respectively, and incorporated herein by this reference. At no time, then or later, did the respondent court have before it any evidence that publication of the grand jury testimony would prejudice the defendants or otherwise affect the fairness of the upcoming criminal trial. Thereafter, in January, 1975, three articles appeared in The Fresno Bee, a large daily newspaper which employs petitioners Rosato and Patterson as news reporters, Gruner as Managing Editor and Bort as City Editor. The articles were interrelated and one discussed a possible conflict of interest between the defendant councilman and a Los Angeles company then bidding on a garbage collection contract shortly to be considered by the Fresno City Council. (R.T. of Hearing, April 23, 1975, 8:12 to 9:7). All three articles referred to testimony given before the grand jury.

Assuming that a court order had been violated, the respondent, on its own initiative, scheduled hearings to commence January 24, 1975, to determine whether petitioners had obtained information from or a copy of the sealed transcript from court officers or attachés. The respondent appointed the County Counsel to represent the court at the hearings and petitioners were served with subpoenas

duces tecum ordering each petitioner to appear as a witness and produce any copy of the transcript he possessed. Petitioners and thirteen other witnesses were interrogated through three days of hearings as to how petitioners obtained the information for the stories. Petitioners responded to most of the questions asked, but they refused to reveal information tending to disclose their news source, each asserting a privilege under the First Amendment and California's shield law.[1] (R.T. of Hearings, January 27, 1975, 123:5-11; 196:13-19; 201:10-15; April 21, 15:19-25). Seventy-three findings of contempt were entered against petitioners for their refusals to answer.[2]

The hearings were characterized by numerous and serious procedural irregularities which were the basis of petitioners' previous unsuccessful petition for writ of prohibition to stop the proceedings.[3] Although they were the obvious targets of the inquiry, petitioners were excluded from the courtroom during the testimony of the other thirteen witnesses. (R.T. of Hearings, January 24, 1975, 7:18-21). Moreover, although the court permitted petitioners to have counsel present in the courtroom, petitioners' attorneys were not permitted to cross-examine any of the court's witnesses, (R.T. of Hearing, February 6, 1975 12:22 to

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1. California Evidence Code, § 1070, as amended, reproduced in full in Appendix.

2. See, generally, *New York Times*, May 14, 1975, p. 26; *Time*, June 2, 1975, pp. 69-70.

3. The petition, filed in the California District Court of Appeals, sought prohibition of further hearings before respondent and was denied March 4, 1975. A subsequent Petition for Hearing filed in the California Supreme Court was denied March 19, 1975. Thereafter an Application for Stay Pending Determination of Petition for Writ of Certiorari was denied by this Court on March 31, 1975. Docket No. A-765 October Term, 1974. No petition for certiorari was filed because the hearings were immediately resumed by the respondent court.

13:6); nor to call any witnesses on petitioners' behalf to clear their names of wrongdoing intimated by the trial judge. (R.T. of Hearing, April 21, 1975, 48:13-21).

The four questions requiring review were timely raised in arguments presented to the California Court of Appeal in petitioners' said Petition for Writ of Certiorari. The court below discussed and rejected each argument. See 51 Cal.App.3d at 205-210 (standard for gag orders); 212-216 (First Amendment Privilege); 216-226 (absolute state legislative protection); and 226-230 (denial of due process).

VI. FIRST REASON RELIED ON FOR ALLOWANCE OF THE WRIT: OUR COURTS LACK A UNIFORM MINIMUM STANDARD FOR IMPOSING PRIOR RESTRAINTS ON SPEECH WHEN FORMULATING GAG ORDERS

There now exists a multi-sided conflict among the five United States Courts of Appeal and several state courts over the appropriate standards to be used by trial courts in determining when the entry of a protective order in a criminal case constitutes a constitutionally impermissible prior restraint on speech.

Petitioners have standing to raise this issue under the two-pronged test enunciated in *Data Processing Service v. Camp*, 397 U.S. 150 (1970), because they (1) have suffered injury and (2) have interests, potentially within the scope of protection of the First Amendment, that have been affected. Petitioners were injured by the entry against them of judgments of contempt at a hearing to investigate the possible violation of respondent's protective orders (Exhibits "C-1" and "C-2"). Said protective orders impaired petitioners' ability to gather news, which in turn affected their protected right to publish news—a right which, this court observed, would be of little value in the absence of sources from which to obtain news. *Branzburg*

v. Hayes, 408 U.S. 665, 681 (1972). Since California law does not treat as contempt the refusal to answer questions about matters over which the Court has no jurisdiction [*State Bar v. Superior Court*, 207 Cal. 323, 339-40 (1929)], petitioners' said convictions for contempt should be annulled. Respondent's protective order constituted an impermissible prior restraint on speech, and therefore no contempt could have resulted from petitioners' said refusal to answer some questions at respondent's hearing.

It is evident from the Order Re Publicity (Exhibit "C-2") that respondent had adopted, whether consciously or unconsciously, a prior restraint standard in preparing its two protective orders (Exhibits "C-1" and "C-2"). The respondent court was willing to tolerate a suppression of speech where such speech "*may interfere* with the constitutional right of the defendants to a fair trial and disrupt the proper administration of justice . . . ." (Emphasis added.) Respondent's "standard" paralleled the standard later employed by the United States Court of Appeals for the Ninth Circuit in *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975). There the court stated that "[t]he most practical and recommended procedure . . . is the entry of an order directing that attorneys, court personnel, enforcement officers and witnesses refrain from releasing any information *which might* interfere with the right of the defendant to a fair trial." 522 F.2d at 468. (Emphasis added.)

On review of the instant case, the California Court of Appeal for the Fifth Appellate District utilized yet a different standard than that announced by the Ninth Circuit when it stated that "the judge need only be satisfied that there is a reasonable likelihood of prejudicial news which would . . . tend to prevent a fair trial." 51 Cal.App.3d at 208, 124 Cal.Rptr. at ..... (1975). (Emphasis added.) In so

ruling, the court below apparently adopted the standard favored by the California Court of Appeal for the Second Appellate District [*Younger v. Smith,* 30 Cal.App.3d 138, 164, 106 Cal.Rptr. 225, 242 (1973)], and rejected by the First Appellate District *Hamilton v. Municipal Court,* 270 Cal.App.2d 797, 801-02, 76 Cal.Rptr. 168, 171 (1969) and Fourth Appellate District *Sun Co. of San Bernardino v. Superior Court,* 29 Cal.App.3d 815, 829, 105 Cal.Rptr. 873, 883 (1973). The conflict thus demonstrated in the differing interpretation and application of Federal Constitutional law between the appellate court below, its fellow Courts of Appeal and the Court of Appeals for the Ninth Circuit is in itself sufficient reason for granting certiorari.

Even more dramatic is the lack of agreement among the United States Courts of Appeal as to the proper constitutional standard to be met before entry of a "gag order". The standard most restrictive of free speech is that applied in *Farr v. Pitchess, supra.* The Courts of Appeal in the Fifth, Sixth and Seventh Circuits have utilized a variety of differing phrases in announcing their respective standards, but each has been more solicitous of the need to protect free speech than was the Ninth Circuit in *Farr v. Pitchess.* The Tenth Circuit appears to favor a standard like that of the Fifth Appellate District court below.

In *United States v. Columbia Broadcasting System, Inc.,* 497 F.2d 102 (5th Cir. 1974), the court reviewed a trial court order forbidding publication of sketches of criminal proceedings. It was the opinion of the court that "before a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be an '*imminent, not merely a likely, threat* to the administration of justice.' The danger," the court went on to say, "must not be remote or even probable; *it must immediately imperil.*" 497 F.2d

at 104. (Emphasis added.) See also *United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1972).

In *CBS, Inc. v. Young,* 522 F.2d 234 (6th Cir. 1975), the court vacated a gag order which, although it did not name the press, was found to be a "*prior direct restraint* upon freedom of expression [removing] significant and meaningful sources of information concerning the case [from the press.]" 522 F.2d at 239. (Emphasis added.) On the facts before it the court found "no substantial evidence to justify the conclusion that a *clear and imminent* danger to the fair administration of justice existed because of publicity." 522 F.2d at 240. (Emphasis added.)

The United States Court of Appeals for the Seventh Circuit has considered this issue several times.[4] In *Chase v. Robson,* 435 F.2d 1059 (7th Cir. 1970), the court reviewed a gag order prohibiting statements by attorneys and defendants about a pending criminal trial and concluded, *per curiam,* that the order was invalid under whichever constitutional test was applied.[5] Later that year, upon review of a class action attacking a rule of court prohibiting photography and broadcasting in connection with judicial proceedings in the environs of the courtroom, the court said that "[a]ny prior restraint on the press must be confined to those activities which offer immediate threat to the judicial

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4. *Chase v. Robson,* 435 F.2d 1059 (7th Cir. 1970); *Dorfman v. Meiszner,* 430 F.2d 558 (7th Cir. 1970); *In re Oliver,* 452 F.2d 111 (7th Cir. 1971); *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242 (7th Cir. 1975).

5. "Applying either the standard that the speech must create a 'clear and present danger' [cite] of a serious and imminent threat to the administration of justice, or the lesser standard that there must be a "reasonable likelihood" [cite] of a serious and imminent threat to the administration of justice, we hold that the trial court's order is constitutionally impermissible." 435 F.2d at 1061.

proceedings and not to those which are merely potentially threatening." *Dorfman v. Meiszner,* 430 F.2d 558, 563 (7th Cir. 1970). Recently, upon consideration of an appeal from a judgment dismissing an action against enforcement of a local court rule proscribing extrajudicial comment by attorneys during pending cases, the court noted its disapproval of any "blanket prohibition on certain areas of comment—a *per se* proscription—without any consideration of whether the particular statement posed a serious and imminent threat of interference with fair trial." *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 251 (7th Cir. 1975).

In *United States v. Tijerina,* 412 F.2d 661 (10th Cir. 1969), the Court of Appeals for the Tenth Circuit upheld a lower court gag order based on a "reasonable likelihood" of prejudicial news resulting from statements of those whose extrajudicial comment was restricted. The court said, "We believe that a reasonable likelihood suffices." 412 F.2d at 666.

The confusion is by no means limited to the California and Federal Courts. See, *e.g., Markfield v. Association of the Bar of the City of New York,* 370 N.Y.S.2d 82, 84-5 (1975), (clear and present danger); *Oliver v. Postel,* 30 N.Y.2d 171, 181, 331 N.Y.S.2d 407, 413 (1972), (clear and present danger or a serious and imminent threat); *Commonwealth v. Lucchese,* 335 A.2d 508, 511 (Pa. Super. 1975), (clear potential).

The cases cited illustrate that there has developed in the lower courts a variety of differing standards for weighing the prior restraint imposed by trial court rules and protective orders—standards that in many cases are not consistent with the heavy presumption against the validity of prior restraints upon speech implicit in the phrases "clear and present danger" and "imminent threat" which this

Court has used in *Bridges v. California,* 314 U.S. 252, 263 (1941); *Pennekamp v. Florida,* 328 U.S. 331, 336 (1946), and *Craig v. Harney,* 331 U.S. 367, 376, (1947). The inherent ambiguities are further complicated by the fact that some courts, in struggling to deal with the problem, have created hybrid standards. See, *e.g., Chase v. Robson, supra,* at 1061 and *Younger v. Smith, supra,* at 161.

The confusion among the jurisdictions illustrates that both the state and federal judiciaries are at sea in their various attempts to deal with this federal constitutional question. To promote judicial efficiency and uniformity in the protection of an important constitutional right, this Court should resolve both parts of the issue suggested by the cases cited hereinabove. First, what degree of threat to the fair administration of justice should be present before a trial court, by order or regulation, can impose a prior restraint on speech? Second, will the proscription against prior restraints on speech imposed absent the requisite minimum threat to a fair trial apply with equal force to "source constraints" (that is, to court orders or rules which prevent news sources from revealing information about pending proceedings)?

The importance of the second part of the question derives from the fact that there have developed, in reality, two separate types of restrictions on the press in gag orders and court rules: (1) media restraints, such as the rule challenged in *Dorfman v. Meizner, supra,* where the press is directly prohibited from exercising a First Amendment freedom, and (2) source constraints, which prohibit the sources of news from commenting about a pending case, but which do not mention the press directly, such as the rules reviewed in *Chicago Council of Lawyers v. Bauer, supra.*

In *Branzburg v. Hayes, supra,* this Court recognized that source constraints can have a significant impact upon news gathering, and therefore upon the ability of the press to publish the news. Such constraints have an even greater chilling effect upon the exercise of freedom of expression than direct prior restraints because they bottle up the information at its very source, whereas media restraints only inhibit publication of information already known. Recognizing the impact upon free expression of gag orders that do not specifically name the press, the United States Court of Appeals for the Seventh Circuit treated one such constraint as a prior direct restraint upon the press. *CBS, Inc. v. Young, supra.*

In the case at bench, neither of the protective orders entered by the trial court named any member of the press. In that regard, the present case differs from *Nebraska Press Association v. Hugh Stuart, Judge, District Court for Lincoln County, Nebraska,* cert. granted, No. 75-817, ... U.S. .... (1975), wherein, as we understand the matter, the gag order prohibits publication of specific information that has already been divulged at a public pre-trial proceeding. Nonetheless, when petitioners in the present case refused to reveal the manner in which they derived the information used in their news stories, they were found in contempt of court.

In contrast to the facts in *Nebraska Press Association, supra,* the information of which the respondent court sought disclosure through the threat of its contempt sanction was in no way germane to the upcoming trial of the bribery and conspiracy defendants. Thus, the actual effect of the protective orders in the instant case upon the press was the same as if the media had been directly forbidden to publish the information which court officers were restrained from

disseminating. The unlimited jail sentences to be meted out upon remand of this case are far more severe than any punishment that could have been imposed upon petitioners if they had violated either the Order Re Publicity or the order sealing the grand jury transcript. Yet the California courts have sanctioned this Draconian result without requiring a threshold showing of interference with the fair administration of justice, without possessing any evidence of danger to the fairness of the impending trial, and without even making any attempt to adduce such evidence.

Accordingly, we respectfully implore this Court to grant this petition and consolidate this case for hearing with *Nebraska Press Association, supra.* Only in so doing will this Court be able to fashion a gag order rule encompassing both media restraints and source constraints.

VII. SECOND REASON RELIED ON FOR ALLOWANCE OF WRIT: THIS COURT SHOULD FIND A QUALIFIED PRIVILEGE IN THE FIRST AMENDMENT TO SUPPORT PETITIONERS' REFUSALS TO REVEAL CONFIDENTIAL NEWS SOURCES

The only opinion of this Court to have dealt with the issue whether the First Amendment protects a newsman's refusal to disclose a confidential news source was *Branzburg v. Hayes,* 408 U.S. 665 (1972), *supra.* The narrow[6] holding in *Branzburg* alluded to a conditional First Amendment privilege for newspersons, 408 U.S. at 682 and 711, and made reference to certain cases which set minimum standards for government intrusion upon First Amendment rights. 408 U.S. at 701-02. The case at bench clearly lies outside the scope of the *Branzburg* rule and the decision below was wrong. The court should have determined that a qualified newsman's privilege existed under the test suggested by the *Branzburg* majority.

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6. 408 U.S. at 683.

Outside the Scope of Branzburg

"The sole issue before [this Court in *Branzburg* was] the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 683. In contrast, the principal issue in the case at bench is the obligation of reporters to respond to subpoenas duces tecum issued by the trial court itself to appear, produce documents, and answer questions relevant not to any investigation into the commission of crime, but rather to an inquiry into an assumed breach of discipline by court officers.

The majority opinion in *Branzburg* stressed the unique role of the grand jury in our system of law, 408 U.S. at 687-91, and accorded much latitude to the grand jury's investigative powers. 408 U.S. at 689. The case at bench is wholly different, having arisen out of a judicially-inspired inquiry neither authorized by statute nor sanctioned by tradition.

The members of the *Branzburg* Court appear to have agreed that the First Amendment affords some measure of protection to newsmen who wish to keep their sources secret, but five members of the Court were unwilling to apply that rule in any of the three particular cases then before the bench. As with any important decision containing dramatic dicta and/or a bare majority writing separate opinions, the state of the law in this area in the wake of *Branzburg* is uncertain, and numerous appeals have been urged upon appellate courts throughout the nation involving the newsman's qualified First Amendment privilege. See, *e.g. Baker v. F and F Investments,* 470 F.2d 778 (2d Cir. 1972); *Brown v. Commonwealth,* 214 Va. 755, 204 S.E. 429 (1974); *State v. St. Peter,* 132 Vt. 266, 315

A.2d 254 (1974); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974).

Two-Pronged Test

One fact evident from the opinions in *Branzburg* is that this Court is of one mind as to two prongs of the test for weighing infringements upon First Amendment rights.[7] 408 U.S. at 700, 701. Petitioners submit that application of that two-pronged test to their case yields the result that the infringement by the state was clearly impermissible constitutionally.

The "state interest" involved here is susceptible of more than one characterization. If that interest is to guarantee a fair trial to the accused, petitioners would concede that such an interest is "compelling" but would hasten to point out that no "substantial relation" can be demonstrated linking the information sought with any subject of overriding interest. None of the questions petitioners refused to answer bore any relation whatever to the issue of the guilt or innocence of the accused. No prejudice to the accused was shown by either the alleged "leak" of information to petitioners or the subsequent publication of the news articles which gave rise to the inquiry.

If the state interest here is characterized as the "duty" of the trial court to "control its own officers," a phrase used by the court below, (51 Cal.App.3d at 223), then assuming *arguendo* that such interest is compelling, no substantial relation can be shown between the disclosures sought and the interest involved. Petitioners all testified

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7. There must be a compelling state interest. *NAACP v. Button,* 371 U.S. 415, 439 (1963), and there must be a substantial relationship between that interest and the information sought. *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 546 (1963).

that no officer, attaché or employee of the court was involved in their having obtained the information used in the subject news stories. Moreover, none of the court's other thirteen witnesses' testimony produced even a shred of evidence to indicate that anyone had violated any court order. Therefore, no relation whatever can be shown between compelling the disclosure of confidential sources and upholding any state interest. In contrast to the absence of a significant state interest in compelling disclosure of the sources is a very significant state interest in protecting their confidentiality—the subject news stories were published with a view toward exposing local political corruption. Thus, the case at bench presents an ideal fact situation for announcing a conditional privilege rule.

VIII. THIRD REASON RELIED ON FOR ALLOWANCE OF WRIT: THE IMPLEMENTATION BY A STATE LEGISLATURE OF A FIRST AMENDMENT RIGHT CONCLUSIVELY ESTABLISHES THE STATE'S INTEREST IN THE EXERCISE OF THAT RIGHT

There is an even more compelling reason than answering the questions left open in *Branzburg* for recognizing a limited constitutional privilege in this case. In the *Branzburg* trilogy of cases, the newsmen argued that the First Amendment supported their refusals to disclose confidential news sources. Mr. Justice White's opinion deferred to Congress and the state legislatures for the fashioning of standards "to deal with the evil" necessitating a newsman's privilege. 408 U.S. at 707. In the case at bench, petitioners, in addition to asserting a First Amendment privilege of non-disclosure, have claimed the protection of the state shield law, Evidence Code § 1070. That statute was a *finding of fact* that the First Amendment's right to a free press means that newsmen in California shall be immune from contempt whenever they refuse to disclose

their sources.[8] That finding of fact conclusively established the state's interest in the protection of confidential news sources and no court can disturb that finding by weighing the balance in favor of another competing interest in the event of a conflict.

That this Court must reverse the judgments below because they abridged petitioners' First Amendment freedom of expression is required by this Court's decision in *Bridges v. California*, 314 U.S. 252 (1941). See also *Wood v. Georgia*, 370 U.S. 375 (1962). In *Bridges*, the trial court had found the defendants in a pending proceeding guilty of contempt for having made out-of-court statements about the trial. State law would have authorized punishment by contempt of their statements only if made in the court's presence. Having determined that the practical effect of the contempt judgments was an impermissible limitation of constitutionally-protected expression, the Court overturned an earlier California Supreme Court decision which had upheld the contempts.

No extension of the *Bridges* rule is necessary to annul the judgments below. Petitioners are not even asking this Court to engage in the judicial fact-finding which was essential to the result in that case, for here the fact-finding has already been done by the legislature. The shield statute directly involved protection of a First Amendment freedom and conclusively established the supremacy of the state's interest in the confidentiality of newsmen's sources over all competing interests. Because the courts below would not have been free to disregard the legislature's find-

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8. Even the California Law Revision Commission, which opposed the legislation, admits that the statute is absolute on its face. 6 California Law Revision Commission Reports, Recommendations and Studies, "A California Privilege Not Covered by the Uniform Rules—Newsmen's Privilege," 481, 484 (1964).

ing if there had been a compelling state interest in obtaining petitioners' testimony, the comparative unimportance to the state of respondent's curiosity whether one of its orders may have been violated scarcely merits comment.

In its arguments to the courts below, respondent has repeatedly claimed that the facts at bench represent a conflict between the Sixth Amendment guarantee of a fair trial and the First Amendment guarantee of a free press. The hypothesized conflict is both illusory and misleading. It fails to grasp the significance of what the Sixth Amendment provides and has stretched the meaning of *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966), *re* the duty of trial courts to guarantee a fair trial to the accused, beyond all reasonable proportion and expectation. Any connection that may have existed between coercing the disclosure of petitioners' sources and the interest of the bribery defendants in obtaining an impartial jury was very tenuous at best.

The Sixth Amendment will, in extreme cases, nullify a conviction resulting from an unfair trial, and *Sheppard* directs trial courts to take steps to safeguard the fairness of their proceedings. However, respondent has read the *Sheppard* dictum as an unlimited grant of authority to treat matters of its own administration as paramount to all other interests, including petitioners' constitutional rights. This was error and the decision below should be reviewed and reversed because, *inter alia,* (1) the First Amendment is the only interest at stake here, and a qualified privilege to protect news sources should have been regarded by the court below as the controlling consideration upon review of this case[9]; and (2) the California

9. See, generally, *Second Reason Relied on for Allowance of Writ, supra.*

legislature has already made a finding of fact that this First Amendment interest predominates over other interests asserted in opposition to it.

IX. FOURTH REASON RELIED ON FOR ALLOWANCE OF THE WRIT: A RULING IS NEEDED TO CLARIFY THE RIGHTS OF QUASI-DEFENDANTS

This court has adjudicated in different contexts the procedural due process rights of various persons not formally accused of crime. It has, for example, considered and overturned a summary contempt conviction for disbelieved testimony by a Michigan one-man grand jury judge in a case where the contemnor was not given adequate notice of the charges against him, was deprived of the opportunity to prepare a defense and was not allowed to call or cross-examine witnesses at the hearing which resulted in his being adjudged in contempt. *In re Oliver,* 333 U.S. 257 (1947). In *Wisconsin v. Constantineau,* 400 U.S. 433 (1971), the due process right to notice was said to extend to all situations where a person's honor, integrity and good name are on the line because of what the government is doing to him.

The hearings which resulted in petitioners' contempt convictions, though dissimilar factually from each of the above cases, involved a novel procedure of questionable constitutional validity in light of those cases. Petitioners were subpoenaed to appear before the respondent court and give testimony at hearings where the overt indications were that the court and its appointed counsel were more interested in finding out whether petitioners themselves had committed any crimes than in their stated objective of perfecting a record as to issues likely to be raised on appeal of the criminal case. The subpoenas contained no indica-

tion that the court harbored any suspicions as to petitioners' conduct. That became evident only through the remarks and the demeanor of the trial court. Petitioners' requests for the opportunity to cross-examine witnesses were denied along with their requests to call exculpatory witnesses. The open bias of the trial judge, witnessed by thousands on local television news broadcasts, had an immediate adverse effect upon the esteem in which petitioners were held by their fellow citizens, yet it was apparent that the respondent and others had no intention of seeking formal criminal charges against them.

Throughout the proceedings below, petitioners asserted that their Fifth, Sixth and Fourteenth Amendment due process rights were being abridged by the respondent court's insistence upon the disclosure of their confidential news sources. Just as consistently, the lower courts replied that petitioners never had due process rights in these proceedings because they were not defendants in the formal sense. The fact of this Court's interest in the subject of the due process rights of quasi-defendants is evident from your grant of a hearing in *United States v. Mandujano,* 496 F.2d 1090 (5th Cir. 1974). Regardless of the result this court reaches in that matter, a fuller explication of what due process means in a quasi-criminal situation is sorely needed, as this case demonstrates.

X. CONCLUSION

The granting of certiorari in this case is necessary (1) to establish, through consolidation with *Press Association of Nebraska v. Hugh Stuart* etc., *supra,* a minimum constitutionally required standard for imposition of gag orders encompassing both media restraints and source constraints; (2) to establish affirmatively the dimensions of

the newsman's First Amendment privilege to protect confidential sources left uncertain by *Branzburg v. Hayes, supra;* (3) to confirm as a matter of constitutional law under the First Amendment that California Evidence Code § 1070 is a legislative finding of fact that the state's interest in protecting confidential news sources overrides all competing interests; and (4) to develop more fully the principle that certain due process rights of quasi-defendants cannot be ignored.

But entirely apart from the legal ramifications of this petition are some inescapable human considerations. This Court is the court of last resort. Four newsmen, your petitioners, now face jail sentences of unlimited duration because of their uncompromising adherence to the most cherished ethical principle of the journalist's profession. This, we submit, cannot and should not have been treated as contempt. We respectfully implore this Court to grant this petition for a writ of certiorari to review and reverse the decision of the California Court of Appeals.

Dated: December 22, 1975

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(Appendix to Follow)

APPENDIX

Appendix

California Evidence Code § 1070:

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or raised to such material has been disseminated.

Exhibit A

[Civ. No. 2623. Fifth Dist. Sept. 8, 1975.]

JOE ROSATO et al., Petitioners, v.
THE SUPERIOR COURT OF FRESNO COUNTY, Respondent.

COUNSEL

John J. Hamlyn, Douglas T. Foster, Fullerton, Lang, Richert & Patch, Philip C. Fullerton, Jeff Wall, Irwin & Thuesen and Donald H. Glasrud for Petitioners.

Arnold & Porter, Mitchell Rogovin, Downey, Brand, Seymour & Rohwer and John F. Downey as Amici Curiae on behalf of Petitioners.

Robert M. Wash, County Counsel, Max E. Robinson, Assistant County Counsel, and Charles E. Moore, Deputy County Counsel, for Respondent.

OPINION

BROWN, (G. A), P. J.—

INTRODUCTION

Petitioners, Joe Rosato and William K. Patterson, reporters, George F. Gruner, managing editor, and Jim Bort, city editor, all employed by Fresno's largest daily newspaper, The Fresno Bee,[1] seek a writ of review

[1]The Fresno Bee is owned and published by McClatchy Newspapers, a corporation, and has a general circulation in Fresno, Madera, Kings and Tulare Counties.

On petition for writ of review, the Court of Appeal affirmed in part and reversed in part. The court held the trial court had both the authority and the duty to issue the protective and sealed orders pursuant to its obligation to assure defendants of a fair trial free from prejudicial publicity, and that the trial court also had the authority and the duty to investigate possible violations of its orders by those subject to their provisions in order to protect the integrity of the judicial process, to assure the proper administration of justice and to perfect the record pertaining to an issue likely to arise on appeal. The court further held that under the facts of the case, defendants' right to a fair trial outweighed the conditional First Amendment right of the newspersons to refuse to disclose sources, and, accordingly, they were entitled to no federal constitutional privilege, nor was there any privilege under the California constitutional provisions. With respect to the privilege provided by Evid. Code, § 1070, the court held that the statute was to be given a broad rather than a narrow construction, that it extends not only to the identity of the source but to the disclosure of any information, in whatever form, which may tend to reveal the source of the information. The court further held, however, that the key to the trial court's power to compel an answer from the newspersons in the face of Evid. Code, § 1070, was the necessity of exploring the violation of its orders by those subject thereto as a means of enforcing the court's constitutional obligation to prevent prejudicial publicity from emanating from its officers. This limitation on the otherwise absolute protection afforded by Evid. Code, § 1070, was held to be applicable only when the questions asked may tend to identify who, if anyone, among those subject to the court's order, may have violated it; the privilege remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court. The court held that the application of that test required a determination on a question by question basis as to whether or not the answer to a question might tend to endanger the revelation of a protected source. Accordingly, the court affirmed and reversed the contempt orders on the basis of the application of that test, and remanded the cause to the superior court for the purpose of affording each of the newspersons an opportunity to purge his contempts before his sentence was executed, in view of the understandable uncertainty as to the scope of the nondisclosure privilege, and on the belief that the newspersons refused to answer the questions in good faith. (Opinion by Brown (G. A.), P. J., with Gargano, J., concurring. Separate concurring and dissenting opinion by Franson, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Criminal Law § 47—Rights of Accused—Fair Trial—Effect of News Media.**—Persons accused of crime enjoy the fundamental constitutional right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution; an indispensable ingredient to a fair trial includes the right of a defendant to have his trial conducted free of pretrial and trial publicity affecting the fairness of the hearing, which right is in a preferred position on the scale of constitutional values.

(2) **Criminal Law § 47—Rights of Accused—Fair Trial—Effect of News Media.**—Following the indictment of a city councilman, land developer, and former member of the city planning commission on charges of bribery and conspiracy, a trial court had both the authority and duty to issue protective orders pertaining to pretrial publicity and sealing the grand jury transcript, pursuant to its inherent and implied power to control judicial proceedings in order to insure the orderly administration of justice. Further, both pursuant to and independent of the authority contained in Pen. Code, § 938.1, the court had the authority to seal the grand jury transcript until the trials of the defendants were completed.

(3) **Criminal Law § 47—Rights of Accused—Fair Trial—Effect of News Media.**—Orders issued by a trial court sealing a grand jury transcript and prohibiting court officers from releasing or discussing any exhibits, documents, or evidence concerning a criminal prosecution were not invalid for failure to give notice or opportunity to be heard to members of the press, where neither the press nor newspersons subsequently found in contempt for refusal to answer questions concerning the source of information released in violation of the orders, were named in the protective or sealed orders, were not subject to their terms, and where those orders did not purport to operate as a direct restraint on newspapers from publishing information regarding the pending trial, and thus did not operate as a direct restraint on publication or free speech. Under these circumstances, in order to issue the orders in question, the trial court needed only to be satisfied that there was a reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial, and

the trial court had no duty to consult with the press or to allow them representation at hearings regarding whether or not to disclose evidence prior to trial.

(4) **Criminal Law § 47—Rights of Accused—Fair Trial—Effect of News Media.**—A trial court was not precluded from conducting a hearing concerning a violation of its order sealing a grand jury transcript and restricting the dissemination of potentially prejudicial evidence prior to any trial of defendants on charges of bribery and conspiracy by the fact that two of the three defendants had been granted a change of venue outside the county in which newspaper articles quoting from the grand jury transcript appeared, since the orders were as applicable to the defendant whose venue had not been changed as to the others, and where much of the information in the articles from the grand jury transcript was not only highly prejudicial to that defendant but also subject to substantial question as to admissibility. Furthermore, that defendant had a right to have his case tried in the place of his residence and was thus not required to obtain a change of venue.

(5) **Criminal Law § 47—Rights of Accused—Fair Trial—Effect of News Media.**—A trial court has the authority and duty to investigate possible violations of orders sealing a grand jury transcript and restricting pretrial publicity by those subject to their provisions in order to protect the integrity of the judicial process, to assure the proper administration of justice, and to perfect the record pertaining to pretrial publicity as an issue likely to arise on appeal. To this end, the court is empowered to require the attendance of witnesses, including those not subject to the orders, and to compel nonprivileged testimony germane to the objects of the hearing.

(6) **Courts § 5—Inherent and Statutory Powers.**—In the initial stages at least, proceedings to investigate violations of court orders instigated by the court itself are not prosecutions of crime, which may only be undertaken by the district attorney or the grand jury.

(7) **Constitutional Law § 57—Scope and Nature—Freedom of the Press.**—During an investigation by a trial court of a violation of its order sealing a grand jury transcript and restricting pretrial publicity emanating from court officers and attaches, the court had the right to require testimony of newspersons as to whether the grand jury transcript that had been quoted extensively in a

newspaper had been obtained from a nonprivileged source subject to the court's protective order, in light of the preeminent importance of the fair trial guaranty to criminal defendants. Accordingly, the newspersons were entitled to no federal constitutional privilege under the First Amendment, and the defendants' right to a fair trial outweighed the conditional First Amendment right to refuse to disclose sources. Likewise, there was no protection under the California constitutional provision.

(8) **Witnesses § 11—Privileged Relationships and Communications —Newspersons.**—In enacting Evid. Code, § 1070, providing that a newsperson cannot be adjudged in contempt for refusing to disclose the source of any information procured for publication, the Legislature recognized the importance of maintaining a free flow of information and intended that the statute be given a broad rather than narrow construction. Accordingly, absent any constitutional or other limitation on the exercise of the privilege, it extends not only to the identity of the source but to the disclosure of any information, in whatever form, which may tend to reveal the source of the information, and, as in the case of the privilege against self-incrimination, the burden is on the person claiming the privilege to show that the testimony may tend to lead to that source, though the burden is not a heavy one.

(9a, 9b) **Witnesses § 11—Privileged Relationships and Communications —Newspersons.**—The privilege under Evid. Code, § 1070, providing that newspersons may not be adjudged in contempt for refusing to disclose sources of information procured for publication, does not shield such persons from testifying about criminal activity in which they have participated or which they have observed. The privilege is also limited by a court's power to control its own officers and to restrict persons subject to its control from disseminating prejudicial pretrial publicity. This limitation on the otherwise absolute protection afforded by Evid. Code, § 1070, is applicable only when the questions asked may tend to identify who, if anyone, among those subject to a court's protective order, may have violated it. The statute still remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court.

(10) **Criminal Law § 47—Rights of Accused—Fair Trial—Effect of News Media.**—In view of a court's obligation and duty to insure a fair trial to criminal defendants by preventing release of potentially prejudicial publicity and to control its own officers and employees, an investigation by the court into a possible violation of its orders restricting pretrial publicity should not be thwarted by narrowly construing the scope of the inquiry, and any doctrinal tension between the First Amendment right of freedom of the press and the Sixth Amendment right to a fair trial resulting in an impasse must be resolved in favor of the relatively unrestricted constitutional right to a fair trial rather than in favor of the relatively limited invasion on freedom of the press caused by the necessity of newspersons to reveal who, if any, of the persons subject to the court's protective order was the source of a sealed grand jury transcript that was quoted extensively by a newspaper. Since the court's task in such an investigation is directed toward the protection of the constitutional right to a fair trial, its investigative powers should necessarily be broad.

(11) **Criminal Law § 47—Rights of Accused—Fair Trial—Effect of News Media.**—A trial court investigating a possible violation of its orders restricting pretrial publicity and sealing a grand jury transcript was not powerless to conduct further investigation merely because the court's officers subject to the order denied that they delivered the grand jury transcript to newspersons who subsequently published it, and that such newspersons denied having received the transcript from any person subject to the court's order. The court was not required to believe witnesses, and as in other investigations and hearings, the court was authorized within the permissible scope of relevancy and absent applicable privileges, to subject witnesses to penetrating interrogation in search of the truth. However, the protection afforded to the press by the privilege provided by Evid. Code, § 1070, that a newsperson may not be the subject to contempt for refusing to disclose the source of information procured for publication, is not totally emasculated by the necessity of the court to determine which of its officers violated the protective and sealed orders.

(12) **Witnesses § 11—Privileged Relationships and Communications —Newspersons.**—The privilege afforded by Evid. Code, § 1070, providing that a newsperson may not be held in contempt for refusal to reveal sources of information procured for publication, is

limited by the power of a court to investigate the violation of orders restricting pretrial publicity as a means of enforcing the court's constitutional obligation to prevent prejudicial publicity from emanating from court officers. The key to the application of such test is a determination on a question by question basis as to whether or not the answer to a question by a newsperson may tend to endanger the revelation of a protected source, that is, one not subject to the court's protective orders. To this end, even in the face of denials that court officers were involved, questions may continue to be asked of newspersons if the answers may reveal that the source of the information was a court officer. However, should a question be over-broad, that is, if it might tend to reveal that either a court official or a protected source was involved in the newsperson's obtaining of the information, the privilege under Evid. Code, § 1070, would apply. Furthermore, a court is not entitled to ask questions directed toward discovering where the information did not come from (other than as they pertain to court officials) in order to narrow the field of inquiry vis-a-vis the protected sources. The court is only entitled to ask questions directed toward affirmatively determining if the information did come from court officers or attaches.

[See **Cal.Jur.3d**, Criminal Law, § 110; **Am.Jur.2d**, Constitutional Law, § 344.]

(13a, 13b) **Courts § 5—Powers and Organization—Inherent and Statutory Powers.**—During an investigation by a trial court into the possible violation of its orders restricting pretrial publicity in a criminal matter and sealing a grand jury transcript, the fact that the inquiry by the court may have incidentally revealed a suspicion of criminal activity which might result in criminal prosecution of persons or witnesses did not cause the court to lose jurisdiction to continue the hearing, on the ground the judicial branch has no authority to investigate crimes, and newspersons called as witnesses did not become entitled to the due process rights accorded a criminal defendant, where, while there was some suggestion that some of the newspersons may have been involved in criminal activity in procuring the grand jury transcript, the proceedings did not substantially deviate from the primary objective of ascertaining the identity of those persons subject to the court's order who violated it, and where the suggestion of criminal activity was incidental to the accomplishment of that principal objective.

(14) Courts § 3—Powers and Organization.—It is clearly not the function of a court to investigate criminal violations, as the power to enforce the state's laws is vested in the attorney general. The responsibility for investigating and prosecuting criminal activity is vested in the district attorney or the grand jury, and no one can institute criminal proceedings without the concurrence, approval, or authorization of the district attorney.

(15) Contempt § 5—Proceedings.—An investigative hearing concerning the violation of a trial court's protective orders concerning pretrial publicity and sealing a grand jury transcript was not required to be conducted before a judge other than the one who entered the protective orders, on the ground that the court issued a press release in which he characterized the press reaction to the case as either based on ignorance or constituting "a biased presentation," and by a reference to what the court perceived to be media "pressure" addressed to him "individually," where no prejudice in fact resulted from those statements and notwithstanding any impropriety, the actual conduct of the proceedings was judicious and even-handed, and where the questions asked of the witnesses, who were newspersons, were not accusatory, but were perfectly proper and should have been answered.

(16) Contempt § 5—Proceedings.—In proceedings by a trial court to investigate violations of its orders restricting pretrial publicity in a criminal matter and sealing a grand jury transcript, newspersons called as witnesses were not entitled to call and cross-examine witnesses or to object to questions.

(17) Appellate Review § 130—Review—Standing to Allege Errors.—Newspersons who were held in contempt for refusing to answer questions during a hearing by a court investigating violation of its orders restricting pretrial publicity in a criminal matter and sealing a grand jury transcript, had standing to challenge the validity of the protective and sealed orders and the jurisdiction of the court to hold the hearings, where the hearings had their genesis in those orders, as the court derived its initial authority to conduct the hearings from alleged violations of those orders, and where the newsperson's "injury" arose indirectly from those charged violations.

(18) Appellate Review § 156—Review—Successive Appeals and Law of the Case.—The summary denial by a Court of Appeal of a petition

for a writ of prohibition to stop hearings conducted by a trial court to investigate violations of its orders restricting pretrial publicity in a criminal matter and sealing a grand jury transcript, did not bar reconsideration of the issue on a petition for writ of review by newspersons called as witnesses in the hearing who were adjudged in contempt for refusing to answer questions. The doctrines of res judicata and law of the case were not applicable, where the former denial of a petition for a writ of prohibition was a summary denial without issuance of an order to show cause and without oral argument; and, while the court accompanied the summary denial with an explanatory comment, it was not a formal opinion precluding the court from considering the issue anew at a hearing at which the parties had an opportunity to brief and argue the case in full.

COUNSEL

John J. Hamlyn, Douglas T. Foster, Fullerton, Lang, Richert & Patch, Philip C. Fullerton, Jeff Wall, Irwin & Thuesen and Donald H. Glasrud for Petitioners.

Arnold & Porter, Mitchell Rogovin, Downey, Brand, Seymour & Rohwer and John F. Downey as Amici Curiae on behalf of Petitioners.

Robert M. Wash, County Counsel, Max E. Robinson, Assistant County Counsel, and Charles E. Moore, Deputy County Counsel, for Respondent.

OPINION

BROWN, (G. A.), P. J.—

INTRODUCTION

Petitioners, Joe Rosato and William K. Patterson, reporters, George F. Gruner, managing editor, and Jim Bort, city editor, all employed by Fresno's largest daily newspaper, The Fresno Bee,[1] seek a writ of review to annul orders of respondent court adjudging them in contempt for refusing to answer questions put to them and committing them to jail[2] until such time as the questions are answered.

The witnesses' refusal to answer is grounded upon the provisions of Evidence Code section 1070,[3] commonly referred to as the "shield law," and upon the First Amendment to the United States Constitution and the analogous provision contained in article I, section 2 of the California Constitution.[4]

This cause has received widespread publicity and comment and the proper resolution of the issues is of more than routine importance to the public, to criminal defendants, to the press[5] and to the courts.

SYNOPSIS OF FACTS

In October of 1974 the Fresno County Grand Jury jointly indicted Fresno City Councilman Marc Stefano, land developer Julius Aluisi and former City of Fresno Planning Commissioner Norman Bains on counts of bribery and conspiracy. Because of the prominence of the defendants and the nature of the charges, the incident generated extensive public interest and discussion.

The original and four copies of the grand jury transcript were delivered by the court reporter to the county clerk, who in turn delivered one copy to the district attorney, one copy to the defendant Stefano, one copy to Paul Mosesian, attorney for defendant Aluisi, and one copy to Assistant Public Defender Hugh Goodwin, attorney for defendant Bains.

[1]The Fresno Bee is owned and published by McClatchy Newspapers, a corporation, and has a general circulation in Fresno, Madera, Kings and Tulare Counties.

[2]Execution of the sentences has been stayed pending determination of this matter on appeal.

[3]Evidence Code section 1070, subdivision (a), provides: "(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public."

[4]The First Amendment to the United States Constitution prohibits the making of any law "abridging the freedom of speech or of the press" and the equivalent provision in article I, section 2 of the California Constitution provides that "a law may not restrain or abridge liberty of speech or press."

[5]Throughout this opinion the word "press" is intended to include all media.

The original was retained in the county clerk's safe except when it was in the possession of the court.

On November 21, 1974, one day before the grand jury transcript normally would have become available to the public, the court, on motion of the three defendants pursuant to Penal Code section 938.1, subdivision (b),[6] ordered the grand jury transcript sealed until completion of all the defendants' trials. On the following day, November 22, 1974, pursuant to motion or concurrence of all of the defendants, respondent court issued and filed a protective order entitled "Order re Publicity" with regard to the three criminal defendants. That order, after reciting the necessity to protect the defendants' right to due process of law and to a fair trial and noting that "it further appearing to the Court that the dissemination by any means of public communication of any out-of-court statements relating to this case may interfere with the constitutional right of the defendants to a fair trial and disrupt the proper administration of justice . . .," directed that: ". . . no party to this action nor any attorney connected with this case as defense counsel or prosecutor, nor any other attorney, nor any judicial officer or employee, nor any public official, including but not limited to any chief of police, nor any sheriff, nor any agent, deputy, or employee of any such person, nor any grand juror, nor any witness having appeared before the Grand Jury in this matter, nor any persor subpeonaed [*sic*] to testify at the trial of this matter, shall release or authorize the release for public dissemination of any purported extra-judicial statement of the defendants or witnesses relating to the case, nor shall any such person release or authorize the release of any documents, exhibits, or any evidence, the admissibility of which may have to be determined by the Court, nor shall any such person make any statement for public dissemination as to the existence or possible existence of any document, exhibit, or any other evidence, the admissibility of which may have to be determined by the Court. Nor shall any such persons express outside of court an opinion or make any comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence. Nor shall any such persons make any statement outside of court as to the nature, substance, or effect of any testimony that has been given. Nor shall any such persons issue any statement as to the identity of any prospective witness, or his probable testimony, or the effect thereof. Nor

[6]Penal Code section 938.1, subdivision (b), provides in pertinent part: "If the court determines that there is a reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair and impartial trial, that part of the transcript shall be sealed until the defendant's trial has been completed."

shall any person make any out-of-court statement as [to] the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter. Nor shall any such person or witness, whether or not under subpoenas [*sic*], make any statement as to the content, nature, substance, or effect of any testimony which may be given in any proceeding related to this matter, except that a witness may discuss any matter with an attorney of record or agent thereof."[7]

Defendant Stefano's motion for change of venue in the criminal matter was granted on January 3, 1975, and a like motion was granted upon the motion of defendant Aluisi on January 7, 1975. Defendant Bains' criminal trial was never transferred from Fresno County.

Notwithstanding the knowledge of petitioners Rosato and Patterson as to the existence and content of the seal and protective orders, there appeared on the front page of The Fresno Bee on January 12, 13 and 14, 1975, stories under their by-lines which quoted extensively from the sealed grand jury transcript.

It appearing to the respondent court that there had been a violation of the court orders, the court directed the county counsel to represent the court[8] in further proceedings concerning the apparent violation of its orders and set a hearing for January 24, 1975. The court asserted that the purpose of the hearing was (1) to punish disobedience of the court's orders by those subject thereto and (2) to perfect a record pertaining to pretrial publicity which the court characterized as an issue likely to be raised on appeal. The hearings were held on January 24 and 27, February 6, April 21 and 23, 1975.

Petitioners Rosato, Patterson and Gruner were served with a subpoena duces tecum directing them to produce at the hearings any copy of the grand jury transcript which they might have in their possession or under their control. A motion to quash the subpoena was filed by their counsel, and, in support thereof, the declarations of petitioners Patterson and Rosato stated that they did not have in their possession or under their control a copy of the grand jury transcript. The declaration of petitioner Gruner, though not denying that he had in his possession or under his

[7]For simplicity, the persons subject to the court order will hereinafter be referred to collectively as "court officers."

[8]Government Code section 27647 authorizes the county counsel to represent a court "in all matters and questions of law pertaining to any of [a] judge's duties."

control a copy of the grand jury transcript, alleged that the articles were derived from confidential news sources, and Gruner did not produce the transcript. The court denied the motion to quash. One of the contempt citations was based upon Gruner's failure to produce the transcript. Petitioner Bort, who did not appear at the hearings until April 21, testified that he did not have in his possession or under his control a copy of the grand jury transcript.

Prior to calling petitioners as witnesses at the hearings, the assistant county counsel, who conducted the hearings before the respondent court, called 13 witnesses who had lawful access to the grand jury transcript and who were subject to the court order. During the direct examination of all witnesses, petitioners and all other witnesses were excluded from the courtroom except when they themselves were testifying. Counsel for petitioners were permitted to remain in the courtroom but were not allowed to cross-examine witnesses except through a procedure whereby questions would be submitted to the assistant county counsel to be asked by him at his discretion.

Each of these 13 witnesses testified that he had no knowledge or information as to how any newsperson obtained a copy of any portion of the grand jury transcript, that he had no objection to newspersons disclosing to the court the source of the quotations from the grand jury transcript which had been published in The Fresno Bee, and that he had no objection to any newsperson releasing to the court any copy of the grand jury transcript in his or her possession. During the course of the examination of these persons, it developed that there were several persons who had either access to the grand jury transcript through one of the persons authorized to possess it or who had copied the transcript pursuant to a request by someone in lawful possession of the document, which persons were not called as witnesses. Among those so identified were the wife and daughter of the court reporter who worked for him in transcription work, the district attorney's secretary, the chief assistant attorney general of the state, a Xerox operator in the district attorney's office, secretaries in Robert Carter's office, counsel for Stefano, an investigator for the district attorney, and an associate attorney of Paul Mosesian, counsel for Aluisi.

Assistant Public Defender Hugh Goodwin testified that the public defender's copy of the grand jury transcript had been kept on Mr. Goodwin's desk for several weeks after he received it on November 12, 1974, and that the public defender's office is locked at the conclusion of

the day. He also testified that the transcript was on one particular corner of his desk for a long period of time and that it was there on a number of occasions when, to his knowledge, no one was in his office. He further indicated that, during the periods when he was there, petitioner Rosato and probably petitioner Patterson visited Goodwin in his office.

Thereupon, petitioners Rosato, Patterson and Gruner were called as witnesses, each of whom was permitted to consult frequently with his counsel, and each of whom was informed of the identity of the prior witnesses and of their statements and of the fact that each prior witness had testified that he had no objection to the disclosure by newsmen of the source of The Fresno Bee articles.

Each of the three petitioners, Rosato, Patterson and Gruner, testified that he did not obtain the "source material" for the articles from one of the defendants Stefano, Aluisi or Bains; from an attorney for one of the defendants; from an associate or employee of an attorney for one of the defendants; from an attorney; from anyone employed in the district attorney's office; from the district attorney himself; from anyone in the public defender's office; from the county clerk or anyone employed by him; from the court reporter or anyone employed by him; from a public official; from a grand juror; from a witness before the grand jury; or from a court attaché or employee.

Patterson stated that no copy of the transcript was obtained by him or another Fresno Bee employee with the knowledge and consent of any of the persons mentioned above, nor was a copy of the transcript taken from the office of any public employee by an agent of the McClatchy Newspapers without knowledge or consent of persons having custody of the transcript. Gruner stated that an officer or employee of The Fresno Bee did not tell him that he or she had obtained a copy of the transcript from any of the persons or classes of persons subject to the order, and that no officer or employee of The Fresno Bee told him that he had any outside help in obtaining a copy of the transcript from one of the persons or classes of persons subject to the order without the knowledge or consent of such persons or classes of persons. Bort disavowed any knowledge as to how the transcript was obtained.

However, petitioner Rosato refused to answer whether he had obtained the transcript from the office of one of those same persons or classes of persons without their knowledge or consent or whether to his knowledge it had been taken from a public office by an agent or

employee of McClatchy Newspapers without the knowledge or consent of the persons having custody or control of it. He further refused to say whether or not he had seen the transcript on Assistant Public Defender Goodwin's desk or whether or not he had been in the offices of the public defender, district attorney or the county clerk when those offices were not open to the public; also, Rosato would not answer whether or not he had obtained the transcript in the courthouse.

Petitioner Patterson admitted that he had seen the grand jury transcript on top of the desk of Assistant Public Defender Goodwin and thought that he had seen it on the district attorney's desk on one occasion. He refused to answer the question as to whether Rosato had told him that he, that is, Rosato, had been in Mr. Goodwin's office at any time within three months preceding the hearing date when no one else was present.

Patterson admitted that he had a master key which he had obtained from a bailiff two or three years prior to the hearing. Upon request, the key was turned over to the court during the hearing. Testimony was adduced that the key was a master key to the Fresno County Courthouse, capable of unlocking various inside and outside doors thereof, including locks on the doors of the chambers of all of the judges of the superior court, doors leading into the corridors which separate the judges' chambers from the courtrooms, and the doors to the public defender's office. It also developed that Rosato had keys by which admittance to the public defender and county clerk's offices could be gained. It further appeared that on occasion two of the superior court judges had left the county clerk's copy of the transcript unattended overnight on their desks in locked chambers.

Pursuant to a stipulation that the answers would not constitute a waiver of the newsman's privilege as to other questions, Rosato, Patterson and Gruner testified that the keys in the possession of Rosato and Patterson were not used in acquiring the source of material for the news articles of January 12, 13 and 14, 1975.

Petitioner Bort testified that the newspaper articles had been written about a month before they were actually published and they were published only after it was learned that the change of venue motion with respect to defendants Stefano and Aluisi was granted. He further stated that there was nothing in the stories with regard to the defendant Bains that had not already been published in earlier stories. Petitioner Gruner

testified substantially to the same effect, stating in part that in making the decision to publish the articles they took into consideration the fact that Stefano was a sitting member of the city council ". . . and we, having weighed the factor of the right to a fair trial, felt that in this instance the rights of the defendants would not be impaired in that regard since the venue change had already been indicated in the case of two of the individuals and that the information with regard to the third defendant was not of significant difference from material that had been published prior to the Grand Jury proceedings."

As a consequence of refusing to answer questions during the hearings, Rosato was cited 26 times for contempt, Patterson was cited 25 times, Gruner was cited 5 times, and Bort was cited 17 times..

SCOPE AND VALIDITY OF PROTECTIVE ORDER AND SEAL ORDER

(1) Persons accused of crime enjoy the fundamental constitutional right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution. In *Sheppard* v. *Maxwell* (1966) 384 U.S. 333 [16 L.Ed.2d 600, 86 S.Ct. 1507], the Supreme Court breathed life and vigor into the fair trial concept as it is affected by pervasive pretrial and trial publicity. The court, in reversing a first degree murder conviction, mandated as an indispensable ingredient to a fair trial the right of a defendant to have his trial conducted free of pretrial and trial publicity affecting the fairness of the hearing, thus placing the right in a preferred position on the scale of constitutional values. The court, while recognizing the vital role of a free press in the effective and fair administration of justice, held that the publicity surrounding a trial may become so extensive, pervasive and prejudicial in nature that, unless neutralized by appropriate judicial procedures, a resultant conviction may not stand, and the trial court has the duty to so insulate the trial from publicity as to insure its fairness. In *Sheppard*, the court instructs: "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." (384 U.S. at p. 363 [16 L.Ed.2d at pp. 620-621, 86 S.Ct. at p. 1522].)

The court there also stated that the trial court ". . . might well . . . [proscribe] extrajudicial statements by any lawyer, party, witness, or court official which [may divulge] prejudicial matters. . ." 384 U.S. at p. 361 [16 L.Ed.2d at pp. 619-620, 86 S.Ct. at p. 1521].)

In the very recent California case of *Allegrezza* v. *Superior Court* (1975) 47 Cal.App.3d 948 [121 Cal.Rptr. 245] (hg. den. July 3, 1975), the court quoted from the Supreme Court case of *Estes* v. *Texas* (1965) 381 U.S. 532, 540 [14 L.Ed.2d 543, 548-549, 85 S.Ct. 1628, 1632], " '[t]he atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—*must be maintained at all costs.*' " The *Allegrezza* court continued, "[i]t is the same right of a fair trial, to one accused of crime, that guarantees all other freedoms, including freedom of speech and of the press. For without the right to a fair trial those freedoms would lack any means of vindication in the face of governmental oppression." (47 Cal.App.3d at p. 952.)

With the impetus provided by *Estes* and *Sheppard*, various prestigious organizations and committees have conducted studies and proclaimed standards and recommendations for trial court action to assure a fair trial, among which is the issuance of a protective order operative against court officers similar to that in the case at bench.[9]

(2) Grounded on both principle and precedent, there can be no doubt that the court had both the authority and the duty to issue the protective and seal orders in this case. The courts have inherent and implied power to control judicial proceedings in order to insure the orderly administration of justice. (*People* v. *Sidener* (1962) 58 Cal.2d 645, 656 [25 Cal.Rptr. 697, 375 P.2d 641]; *Millholen* v. *Riley* (1930) 211 Cal. 29, 33 [293 P. 69].) While certain of the implied powers have received legislative definition, the enactments neither created nor circumscribed the powers thus defined. Thus, Code of Civil Procedure section 128, subdivisions 3-5, represent a statutory confirmation of the court's power "[t]o provide for the orderly conduct of proceedings before it, or its officers," of power "[t]o compel obedience to its judgments, orders, and

[9]See: (1) American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (Approved Draft 1968). See Reardon, *The Fair Trial-Free Press Standards* (1968) 54 A.B.A.J. 343. (2) Committee on the Operation of the Jury System, Report of the Committee on the "Free Press-Fair Trial" Issue of the Judicial Conference of the United States (1969) 45 F.R.D. 391; (1971) 51 F.R.D. 135. (3) Freedom of the Press and Fair Trial: Final Report with Recommendations of the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York. (Columbia University Press, 1967.)

process," and power "[t]o control . . . the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it. . ." This authority has been explicated and amplified by court decision. (See *Cooper* v. *Superior Court* (1961) 55 Cal.2d 291, 301 [10 Cal.Rptr. 842, 359 P.2d 274]; *People* v. *Merkouris* (1956) 46 Cal.2d 540, 556 [297 P.2d 999]; *People* v. *Smith* (1970) 13 Cal.App.3d 897, 907 [91 Cal.Rptr. 786].)

Specifically, with reference to protective orders, the trial court in *Frazier* v. *Superior Court* (1971) 5 Cal.3d 287, 295 [95 Cal.Rptr. 798, 486 P.2d 694], was commended by the Supreme Court of California for issuing an order re publicity. In *People* v. *Sirhan* (1972) 7 Cal.3d 710 [102 Cal.Rptr. 385, 497 P.2d 1121], a protective order substantially similar to that in the case at bench was issued, and both the Supreme Court of California and the United States Supreme Court denied review of its propriety. (*Younger* v. *Superior Court* (1968) 393 U.S. 1001 [21 L.Ed.2d 465, 89 S.Ct. 489]; Warren and Abell, *Free Press-Fair Trial: the "Gag Order," a California Aberration*, 45 So. Cal.L.Rev. 51, 61-62.) Moreover, like orders have received appellate approval in *Younger* v. *Smith (Busch* v. *Superior Court)* (1973) 30 Cal.App.3d 138, 156-159 [106 Cal.Rptr. 225], *Farr* v. *Superior Court* (1971) 22 Cal.App.3d 60 [99 Cal.Rptr. 342], and *Hamilton* v. *Municipal Court* (1969) 270 Cal.App.2d 797, 801 [76 Cal.Rptr. 168]. There has been a spate of such orders throughout the state. (See 45 So.Cal.L.Rev. 51, 62, *supra.*)

Thus, it is clear beyond cavil that the trial court had the authority and the affirmative duty to issue the protective order here and, pursuant to and independent of the authority contained in Penal Code section 938.1, to seal the transcript until the trials of the defendants were completed. (See *Craemer* v. *Superior Court* (1968) 265 Cal.App.2d 216, 223-225 [71 Cal.Rptr. 193].)

(3) Petitioners contend that the orders are invalid because they were not given notice of nor opportunity to be heard at the hearings at which the protective and seal orders were issued. This argument misconceives the nature of the orders and the standing of the press. It is of crucial importance to keep clearly in mind that neither the press nor the petitioners were named in the protective or seal orders, that they were not subject to their terms, and that those orders did not purport to operate as a direct restraint on newspersons from publishing any information regarding the pending trial. Thus, the orders did not operate as a direct restraint on publication or free speech as was the

situation in *Sun Co. of San Bernardino* v. *Superior Court* (1973) 29 Cal.App.3d 815 [105 Cal.Rptr. 873] and *Younger* v. *Smith (Times Mirror Company* v. *Superior Court), supra,* 30 Cal.App.3d at p. 153, cited and relied upon by petitioners. Accordingly, the "clear and present danger" test, i.e., the requirement that the substantive evil or danger must be extremely high before publication of utterances can be restrained, is not applicable. (See *Bridges* v. *California* (1941) 314 U.S. 252, 263 [86 L.Ed. 192, 203, 62 S.Ct. 190, 159 A.L.R. 1346]; *Bantam Books, Inc.* v. *Sullivan* (1963) 372 U.S. 58, 70 [9 L.Ed.2d 584, 593, 83 S.Ct. 631, 639]; *People* v. *Superior Court (Freeman)* (1975) 14 Cal.3d 82 [120 Cal.Rptr. 697, 534 P.2d 393].)

Rather, the judge need only be satisfied that there is a reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. (*Younger* v. *Smith (Busch* v. *Superior Court), supra,* 30 Cal.App.3d at pp. 159-164; *United States* v. *Tijerina* (10th Cir. 1969) 412 F.2d 661, 666.) This test is identical to the test which is used with regard to motions for change of venue in criminal cases (see *Maine* v. *Superior Court* (1968) 68 Cal.2d 375, 383 [66 Cal.Rptr. 724, 438 P.2d 372]; *Younger* v. *Smith (Busch* v. *Superior Court), supra,* at p. 160) and, as noted in *Busch,* the judge in making the order has little choice but to assume prophylactically that the case will be tried where the alleged crime was committed, which is usually the locality where the prejudicial publicity is likely to be the heaviest.

Moreover, the trial court does not have a duty to consult with the press or to allow them representation at hearings regarding whether or not to disclose evidence prior to trial. In *Allegrezza* v. *Superior Court, supra,* 47 Cal.App.3d 948, the trial court refused to permit an *in camera* hearing away from the press and public to determine the voluntariness of a confession pursuant to Evidence Code, section 402, subdivision (b). The appellate court issued a peremptory writ requiring an in-chambers hearing and in the course of that opinion made the following observation, with which we agree: "The superior court was not obliged to strike a proper balance between the First Amendment right of freedom of the press, and the Fifth Amendment's guaranty of a fair trial. In the context of this case the rights of the press are no greater than the rights of the public generally. And the public generally has no right to pretrial disclosure of questionable evidence, a disclosure which might well deny to the accused the fair and impartial trial which is his due. [Citation.]" (47 Cal.App.3d at p. 951.) (See also *Craemer* v. *Superior Court, supra,* 265 Cal.App.2d at p. 219; *State* v. *Buchanan* (1968) 250 Ore. 244 [436 P.2d

729, 730-731] (cert. den. 392 U.S. 905 [20 L.Ed.2d 1363, 88 S.Ct. 2055]).) Accordingly, the press had no right to be notified or to be present when the orders were being considered.[10]

(4) Petitioners argue that, because venue in the Stefano and Aluisi cases was changed outside Fresno County, the protective and seal orders lost their purpose and vitality and that after the transfer of these two cases there was no reason to conduct the hearings since the defendants were not prejudiced by the articles. However, the orders were as applicable to defendant Bains as they were to defendants Stefano and Aluisi. Despite the existence of the court orders and the judicial determination represented by them, i.e., that revealing the transcript would tend to deprive defendant Bains of a fair trial also, the newspapers came to an opposite conclusion and published the articles nevertheless. We also note that, since it is admitted that the news articles were written approximately one month before they were published, the violation of the court orders obviously occurred well before the motions to change venue were made or granted.

Moreover, we have reviewed the contents of the articles in the light of the nature of the joint indictment against all of the defendants charging conspiracy and the rules with respect to the admissibility of evidence and find much of the information in the articles from the grand jury transcript to be not only highly prejudicial to defendant Bains but also subject to substantial question as to admissibility. We, therefore, do not accord any merit to petitioners' argument in this regard. (See *Farr* v. *Superior Court, supra,* 22 Cal.App.3d at pp. 67-68—the trial court retains the power to investigate the violation of the protective order and punish for contempt even where the principal action has terminated; *Morelli* v. *Superior Court* (1969) 1 Cal.3d 328, 332 [82 Cal.Rptr. 375, 461 P.2d 655].) At the time respondent court made the orders sealing the grand jury transcript and restricting dissemination of potentially prejudicial evidence prior to any trial and at the time of the publication of the three articles at issue, there existed a reasonable likelihood that publication of the grand jury transcript would endanger defendant Bains' right to a fair trial in Fresno County.

[10]It in fact appears that at the request of an attorney for the McClatchy Newspapers the court convened a hearing of defense counsel in the criminal cases on December 2 to determine if the protective order should be modified in certain particulars suggested by McClatchy's counsel. The modification was granted in one respect and denied in two others.

Petitioners have suggested that defendant Bains should also have moved for a change of venue. But a defendant has a right to have his case tried in the place of his residence, and no change of venue can be forced down his throat by publicity in the press. (See *Jackson* v. *Superior Court* (1970) 13 Cal.App.3d 440 [91 Cal.Rptr. 565, 46 A.L.R.3d 290].)

AUTHORITY TO CONDUCT HEARINGS

(5) Clearly, the trial court has the authority and duty to investigate possible violations of its protective and seal orders by those subject to their provisions in order to protect the integrity of the judicial process, to assure the proper administration of justice and to perfect the record pertaining to an issue likely to arise on appeal. To this end the court is empowered to require the attendance of witnesses, including those not subject to the orders, and to compel nonprivileged testimony germane to the objects of the hearing. (Code Civ. Proc., § 128, subds. 4, 5, 6, § 177, subds. 2, 3, § 187, § 1209, subds. 5, 8, 9; Evid. Code, § 775; *Millholen* v. *Riley, supra,* 211 Cal. at pp. 33-35; *Farr* v. *Superior Court, supra,* 22 Cal.App.3d 60, 69-70 (hg. den. March 20, 1972; cert. den. 409 U.S. 1011 [34 L.Ed.2d 305, 93 S.Ct. 430]); *Whitlow* v. *Superior Court* (1948) 87 Cal.App.2d 175, 181-185 [196 P.2d 590]; see also *Morelli* v. *Superior Court, supra,* 1 Cal.3d at pp. 332-333; *Ligda* v. *Superior Court* (1970) 5 Cal.App.3d 811, 826 [85 Cal.Rptr. 744]; *Fairfield* v. *Superior Court* (1966) 246 Cal.App.2d 113, 120 [54 Cal.Rptr. 721].)

Petitioners' effort to distinguish *Whitlow* v. *Superior Court, supra,* upon which the *Farr* court relied, must fail. In the *Whitlow* case the court issued the subpoenas to the witnesses called. The decision explicitly states that the witnesses were not charged with a crime but were merely witnesses as to the court reporter's possible violation of his duty. (87 Cal.App.2d at p. 181.) And, the *Whitlow* court further explained that the *court itself* has a duty to inquire into the charges against its officers and attachés with respect to occurrences within the court and to take evidence to that effect. (87 Cal.App.2d at pp. 181-182.) Therefore, it is clear that the *Farr* court did not misapply the principles enunciated in *Whitlow* as they relate to a court's authority or procedures in investigating into misconduct of officers and attachés under its control.[11]

[11]While it is true that the district attorney participated in the proceeding, it was not a criminal proceeding and the court's duty and authority to investigate the court reporter's conduct was not dependent upon that participation.

Petitioners also argue that *Farr* should not be followed because it is ignored *Ex parte Zeehandelaar* (1886) 71 Cal. 238 [12 P. 259], which case petitioners argue mandates a different result on the jurisdictional issue. However, they rely primarily upon dicta by a concurring justice which, of course, is not binding and does not constitute the holding of the court. (*People* v. *Amadio* (1971) 22 Cal.App.3d 7, 14 [98 Cal.Rptr. 909].) In the *Zeehandelaar* case, a divorce action, petitioner (a newsman) was sworn as a witness but refused to answer the one question put to him by respondent court, which was "I desire to know if [husband] or [an attorney] . . . has made to you any statements as to what transpired during the progress of the trial." (71 Cal. at p. 240.) The narrow holding of the majority of the court was that the refusal to answer the question was not contempt because the question was not pertinent to the issue of the divorce (71 Cal. at pp. 239-241), which at that time was the only issue before the court. The court had not convened, as here, a hearing to invesitgate the violation of a court order. Consequently, the *Farr* case properly ignored *Zeehandelaar.*

Petitioners also allege that, unlike *Farr* where the newsman told the court that persons subject to the order re publicity had violated the or, in the instant case respondent court had no such facts which would "trigger" the court's obligation to control its own officers by way of the hearings. We disagree. It is manifest that since the only copies of the grand jury transcript were originally in the hands of persons subject to the orders, any "leak" to the press would in the first instance appear to have been attributable to a court official. Thus, initially, pursuant to the authorities above cited, the court certainly had the authority to instigate efforts to determine whether or not its order had been violated by such persons.

(6) At the initial stages, at least, proceedings to investigate violations of court orders instigated by the court itself are not prosecutions of crimes which may only be undertaken by the district attorney or the grand jury. (See *People* v. *Municipal Court* (1972) 27 Cal.App.3d 193 [103 Cal.Rptr. 645].) Therefore, to the extent that the *Farr* case authorizes such investigations by a court, that holding does not authorize a usurpation by the judiciary of functions exclusively within the province of the executive branch and is not unconstitutional. (Code Civ. Proc., § 128, subds. 4, 5, 6, § 177, subds. 2, 3, § 187, § 1209, subds. 5, 8, 9; Evid. Code, § 775; *Millholen* v. *Riley, supra,* 211 Cal. at pp. 33-35; *Farr* v. *Superior Court, supra,* 22 Cal.App.3d 60, 69-70; *Whitlow* v. *Superior Court, supra,* 87 Cal.App.2d 175, 181-185; see also *Morelli* v. *Superior*

Court, supra, 1 Cal.3d at pp. 332-333; *Ligda* v. *Superior Court, supra,* 5 Cal.App.3d at p. 826; *Fairfield* v. *Superior Court, supra,* 246 Cal.App.2d at p. 120.)

Whether or not the proceedings later turned into a criminal investigation or criminal prosecution will be considered at a later place in this decision.

PRIVILEGE FOUNDED ON FEDERAL AND STATE CONSTITUTIONS

In the performance of their function as arbiter under the Constitution, the courts have quite properly shown extraordinary and sensitive solicitude for the preservation of a free and untrammeled press as an indispensable guardian of our freedom. (See, e.g., *Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130, 145 [18 L.Ed.2d 1094, 1105, 87 S.Ct. 1975, 1986]; *Freedman* v. *Maryland* (1965) 380 U.S. 51, 56-57 [13 L.Ed.2d 649, 653-654, 85 S.Ct. 734, 737-738]; *N. A. A. C. P.* v. *Button* (1963) 371 U.S. 415, 439 [9 L.Ed.2d 405, 421-422, 83 S.Ct. 328, 341]; *Talley* v. *California* (1960) 362 U.S. 60, 64-65 [4 L.Ed.2d 559, 562-563, 80 S.Ct. 536, 538-539]; *Grosjean* v. *American Press Co.* (1936) 297 U.S. 233, 250 [80 L.Ed. 660, 668-669, 56 S.Ct. 444, 449]; *Near* v. *Minnesota* (1931) 283 U.S. 697, 722 [75 L.Ed. 1357, 1370-1371, 51 S.Ct. 625, 633].) It has been repeatedly acknowledged that the freedom exists to insure the unimpeded flow of information indispensable to the existence of a democratic society. (*Time, Inc.* v. *Hill* (1967) 385 U.S. 374, 389 [17 L.Ed.2d 456, 467-468, 87 S.Ct. 534, 543]; *Mills* v. *Alabama* (1966) 384 U.S. 214, 218-219 [16 L.Ed.2d 484, 487-488, 86 S.Ct. 1434, 1436-1437]; *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 269 [11 L.Ed.2d 686, 700, 84 S.Ct. 710, 720, 95 A.L.R.2d 1412].)

It is equally clear, however, that the absolutist view of the First Amendment guarantee held by some has never been accepted, although those freedoms are limited only by narrow, compelling exceptions (*Brandenburg* v. *Ohio* (1969) 395 U.S. 444, 447-448 [23 L.Ed.2d 430, 433-434, 89 S.Ct. 1827, 1829-1830]) and any interference therewith is closely and carefully scrutinized (*L.A. Teachers Union* v. *L.A. City Bd. of Ed.* (1969) 71 Cal.2d 551, 556 [78 Cal.Rptr. 723, 455 P.2d 827]). In weighing valid First Amendment interests against other substantial public and governmental interests, the conditional nature of the First Amendment right has been consistently recognized. Space does not

permit a cataloging of all instances in which some burden upon the press has been approved in the interests of other compelling public interests.[12]

So in *Branzburg* v. *Hayes* (1972) 408 U.S. 665 [33 L.Ed.2d 626, 92 S.Ct. 2646], the Supreme Court, while recognizing that requiring a newsman to disclose his source may inhibit the free flow of information by drying up that source, held that a newsman had to appear before a grand jury and answer all relevant questions during a criminal investigation, saying: "On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." (408 U.S. at pp. 690-691 [33 L.Ed.2d at pp. 644-645, 92 S.Ct. at p. 2661].) Thus the court held that while the press has a First Amendment right of uncertain dimensions to gather news and to not disclose sources, that right is outweighed by the state interest in the performance of a grand jury's duty to ferret out criminal activity and to prevent the arbitrary filing of complaints against innocent citizens. The court also verified that a newsperson would have the same duty to appear at trial pursuant to a subpoena and give what information he possesses.

(7) In the light of the preeminent importance of the fair trial guarantee to criminal defendants (see *ante,* pp. 205-207) which is certainly entitled to equal, if not greater, protection than criminal investigations by grand juries, it seems to us that the right to require such testimony in an investigation growing out of the violation of an order which goes to the right of a criminal defendant to a fair trial is irrefutable. This question was definitively resolved in *Farr* v. *Superior Court, supra,* 22 Cal.App.3d at pages 72-73, wherein the court explicated:

"In the matter at bench there is an undeniable need for disclosure of source if the court is not to be thwarted in its effort to enforce its order against prejudicial publicity issued to comply with the mandate of the United States Supreme Court in *Sheppard* v. *Maxwell,* . . . 384 U.S. 333. That same mandate declares that the public interest in fair trial is so compelling as to both validate and require that in appropriate situations the public temporarily be denied access to prejudicial publicity emanat-

[12]See for a partial listing *Branzburg* v. *Hayes, infra,* 408 U.S. at pp. 682-684 [33 L.Ed.2d at pp. 639-641, 92 S.Ct. at pp. 2657-2658].

ing from court controllable sources. Since the highest court in the United States has ruled that prejudicial material from those sources may properly be kept from news media no public purpose is frustrated by compelling a newsman to reveal his source of a violation of an order such as that considered here. If disclosure of the source of a violation may inhibit future violations, the inhibition serves the public purpose declared by the high court and deprives the public of only that information which that court has declared must be kept from it temporarily if the constitutional right to a fair trial is to be preserved.

"Balancing, as we are required to do, the interest to be served by disclosure of source against its potential inhibition upon the free flow of information, we conclude that petitioner is not privileged by the First Amendment to refuse to answer the questions put to him in the trial court."

In *Farr* v. *Pitchess* (9th Cir. 1975) — F.2d —, Farr sought federal habeas corpus relief from his sentence for contempt. In denying relief, the Ninth Circuit Court of Appeals expressly approved the trial court's conclusion that the conditional newsman's privilege not to disclose sources "must yield to the more important and compelling need for disclosure" (at p. —) to protect the constitutional right of accused persons to a fair trial.

At the time the court ordered that the grand jury transcript be sealed, it impliedly found that the need to seal the transcript to protect the defendants' right to a fair trial outweighed the public right to know the contents of the transcript. At the commencement of the hearings at issue here, respondent court recognized the gravity of a possible violation of its protective and seal orders designed to protect the right to a fair trial, and, by necessity, determined that that right outweighed the right of any of the witnesses to not disclose sources by deciding to proceed with the questioning at the hearing; the "balancing" process occurred both at the time the transcript was ordered sealed and again at the commencement of the hearings.[13]

[13]As has been stated, when the court decided to go forward with the hearings, it recognized the seriousness of the violation of its orders designed to preserve and protect the right to a fair trial and the integrity of the court processes so necessary to guarantee that right in relation to the limited First Amendment right not to disclose. Having done that and properly decided under the law and the facts of this case that there was no First Amendment privilege, the balancing process was at an end. The dissent's suggestion that there is a constitutionally mandated multi-factor balancing process with respect to each question asked is not only impracticable, cumbersome and unworkable but is inconsistent with the conclusion arrived at before the hearings began, that under the circumstances no First Amendment privilege existed.

We have independently reviewed the record and have likewise come to the conclusion that the right to a fair trial outweighed the conditional First Amendment right to refuse to disclose sources. Accordingly, under the facts of this case, we hold that the petitioners herein were entitled to no federal constitutional privilege under the First Amendment.

With regard to the California constitutional provision contained in article I, section 2 (see fn. 4, *ante*), petitioners state in their brief that "[since there is no substantive difference between the two documents with regard to press freedom, the same considerations should be instructive in the interpretation of the state [C]onstitution as are used to guide the courts in construing the United States Constitution." We agree with that position and hold by a parity of reasoning that there is no protection under the California constitutional provision.

Basing their argument upon some observations of Justice Powell in a short concurring opinion (a concurring opinion has no binding effect (*People* v. *Amadio* (1971) 22 Cal.App.3d 7, 14 [98 Cal.Rptr. 909])) and upon a test proposed by three of the dissenting justices in *Branzburg* and adopted in different forms by some lower courts (see *State* v. *St. Peter* (1974) 132 Vt. 266 [315 A.2d 254]; *Brown* v. *Commonwealth* (1974) 214 Va. 755 [204 S.E.2d 429] (cert. den. 419 U.S. 966 [42 L.Ed.2d 182, 95 S.Ct. 229]; *Democratic National Committee* v. *McCord* (D.D.C. 1973) 356 F.Supp. 1394; *Baker* v. *F & F Investment* (2d Cir. 1972) 470 F.2d 778;[14] cf. *Garland* v. *Torre* (2d Cir. 1958) 259 F.2d 545 (cert. den. 358 U.S. 910 [3 L.Ed.2d 231, 79 S.Ct. 237]), amici curiae argue that newsmen have a qualified privilege under the First Amendment to refuse to reveal their source of information if they can show (1) the testimony would be

Moreover, whatever may happen to the principal criminal cases pending the investigative hearings, given the importance of the court order in assuring fair trials, the court has a continuing vital interest in ridding the fox from the chicken coop.

[14]These cases are in fact readily distinguishable from and reconcilable with the majority decision in *Branzburg* and with the result of the case at bench. Three of the cases *State* v. *St. Peter, Democratic National Committee* v. *McCord, Baker* v. *F & F Investment)* involved a refusal of a journalist to disclose his source in civil discovery proceedings. As those cases expressly recognize in applying the *Branzburg* formulation, in a civil discovery proceeding there is not a sufficient compelling state or public interest to outweigh the conditional First Amendment right not to disclose sources, and for that primary reason discovery was denied. In the fourth case *(Brown* v. *Commonwealth)* the reporter refused to disclose sources of an article he had published about the crime while testifying at a criminal trial. The refusal was upheld upon the express ground that the statements attributable to the newsman were not material to any issue in the case, i.e., to the proof of the crime, to the defense or to the punishment.

irrelevant to the proceeding at hand, (2) the testimony would further no compelling state interest, and (3) alternate sources for obtaining the information have been exhausted. (See Goodale, *Branzburg* v. *Hayes and the Developing Qualified Privilege for Newsmen* (1975) 26 Hast.L.J. 709, 716-743.)[15] This was the position urged by the newsperson and press in *Branzburg* (see 408 U.S. at p. 680 [33 L.Ed.2d at pp. 638-639, 92 S.Ct. at p. 2656]), and, while the court recognized a conditional First Amendment right not to disclose sources and while factually the requirements of relevancy and compelling state interest were met in that case, as they are in the case at bench, the court in *Branzburg* imposed no requirement that alternate sources for obtaining the information be exhausted. (See 408 U.S. at pp. 702-706 [33 L.Ed.2d at pp. 651-654, 92 S.Ct. at pp. 2667-2669]; Witkin, Cal. Evidence (2d ed. 1974 Supp.) Witnesses, § 890, pp. 554-557.)[16] Essentially, our colleague in his dissent is arguing petitioner's position that this court should adopt a test which has already been rejected by the United States Supreme Court. We, of course, are bound by *Branzburg*. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) Any change will have to come from higher authority, to which these arguments are most certainly addressed.

PRIVILEGE UNDER EVIDENCE CODE SECTION 1070

What has been said is prologue. The pivotal issue in this cause is the interpretation of the scope of and the limitations upon the protection afforded by Evidence Code section 1070. (See fn. 3, *ante*.)

Initially, we note that the meaning of the language "the source of any information . . ." has not been interpreted in this state.[17]

[15]Mr. Goodale is Executive Vice President of the New York Times and a member of the New York Bar. He was counsel for that newspaper in *United States* v. *Caldwell*, one of the trilogy of cases before the Supreme Court when *Branzburg* was decided.

[16]Moreover, counsel for petitioners at oral arguments conceded that the alternate source requirement had been met in this case. He stated: "Going back to our three-fold test, we would say, on the alternate source, that a reasonable stab was made in this case, a reasonable attempt was made by respondents [*sic*] to find an alternate source. So, our objection under the First Amendment argument is based on the second two grounds, relevance to guilt or innocence and compelling state need."

[17]Pointing to the fact that the section provides only that a newsperson is immune from contempt for failing to reveal the source of his information, rather than a privilege against all sanctions, respondent argues this evidences a legislative intent to narrowly construe the statute. We place no weight on this argument. Labeling the protection an immunity rather than a privilege is of no importance. At the very least, the statute creates a privilege against being held in contempt for refusing to answer questions concerning the source of information, which is precisely what the situation is in this case.

There is no available legislative history to show what the Legislature's purpose was in enacting the shield law in California, nor is there any explicit statement from that body on how broad it intended the privilege to be, so we must look to other aids. The first shield law was enacted by an amendment, in 1935, to former Code of Civil Procedure section 1881, a statute which listed certain privileges against giving testimony, after an introductory policy declaration stating that "There are particular relations in which it is the policy of the law to encourage confidence." The coverage of the section has been enlarged by several amendments since then. When the laws of evidence were codified in 1965, the newspersons' shield law became Evidence Code section 1070. The California Law Revision Commission, which was responsible for the initial drafting of the Evidence Code, noted that "Despite the absence of reliable evidence in the form of legislative history or judicial interpretation, the effect of the statutory privilege in California appears to be a carte blanche grant of an absolute and unqualified privilege to newsmen to refuse to disclose the source of any information procured for and used in the protected news media." (6 Cal.Law Revision Commission Reports, Recommendations and Studies, *A California Privilege Not Covered by the Uniform Rules—Newsmen's Privilege*, 481, 484 (1964).) The California Law Revision Commission favored placing limitations on the privilege, but the Legislature rejected the proposals. "Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes. [Citations.]" (*Van Arsdale* v. *Hollinger* (1968) 68 Cal.2d 245, 249 [66 Cal.Rptr. 20, 437 P.2d 508].)

A cardinal rule of statutory construction is summarized in 45 Cal.Jur.2d, Statutes, section 116: "Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers—one that is practical rather than technical, and that will lead to a wise policy rather than to mischief or absurdity. Thus, where a statute is susceptible to two constructions, the one that leads to the more reasonable result will be followed. A literal construction that will lead to absurd results should not be given if it can be avoided."

(8) Having in mind this rule as it relates to the unqualified language used in Evidence Code section 1070, together with the observations of the California Law Revision Commission, we believe the Legislature in enacting Evidence Code section 1070 recognized the importance of maintaining a free flow of information and intended that the statute be given a broad rather than a narrow construction. Accordingly, absent any

constitutional or other limitation on the exercise of the privilege (see discussion, *post*), we believe it extends not only to the identity of the source but to the disclosure of any information, in whatever form, which may tend to reveal the source of the information, and, as in the case of the privilege against self-incrimination, the burden is upon the person claiming the privilege to show that the testimony may tend to lead to that source. Though the burden is on the person claiming the privilege, it is not a heavy one. (*United States* v. *Reynolds* (1953) 345 U.S. 1 [97 L.Ed. 727, 73 S.Ct. 528, 533, 32 A.L.R.2d 382]; Evid. Code, § 404; *Cohen* v. *Superior Court* (1959) 173 Cal.App.2d 61, 68 [343 P.2d 286]; Witkin, Cal. Evidence (2d ed. 1966) Witnesses, § 933, pp. 869-870.)

In arriving at this conclusion, we have in mind the similar criteria utilized in analyzing the scope of the privilege against self-incrimination (Evid. Code, §§ 940, 404),[18] which we believe to be an appropriate analogy, to be used as a guide only, in this case. (See Jefferson, Cal. Evidence Benchbook (1972) Privilege Against Self-Incrimination, §§ 44.4, 44.5, pp. 765-769.) Likewise, in determining the applicability of the newsperson's privilege, the court must, as it does with the privilege against self-incrimination, consider not only the offered evidence but the matters disclosed in argument, the implication of the question, the setting in which it is asked, and all other relevant factors. (*United States* v. *Reynolds* (1953) 345 U.S. 1, 8-9 [97 L.Ed. 727, 733-734, 73 S.Ct. 528, 532-533]; *Cohen* v. *Superior Court, supra,* 173 Cal.App.2d 61, 70.)

(9a) Having defined the scope of the newsperson's privilege under Evidence Code section 1070, we next consider limitations on the exercise of that privilege.

While petitioners have not expressly contended that section 1070 shields newspersons from testifying about criminal activity in which they have participated or which they have observed, it is noted that this approach has been denied by the Supreme Court of the United States and by the Legislature in analogous statutory privileged relationships.

As the Supreme Court pointedly observed in *Branzburg* v. *Hayes, supra,* 408 U.S. at pages 691-692 [33 L.Ed.2d at pp. 645-646, 92 S.Ct. at p. 2662]" "It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or

[18]Evidence Code section 940 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. . . .

"Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not." (Fn. omitted.) (See Witkin, Cal. Evidence (2d ed. 1974 Supp.) Witnesses, § 890, pp. 554-557.)

The limitation also has been applied to legislative privilege (*Gravel* v. *United States* (1972) 408 U.S. 606, 628 [33 L.Ed.2d 583, 92 S.Ct. 2614, 2628]) and to the executive privilege of the President of the United States (*United States* v. *Nixon* (1974) 418 U.S. 683 [41 L.Ed.2d 1039, 94 S.Ct. 3090]).

Similar principles apply to the attorney-client privilege (Evid. Code, § 956; *Abbott* v. *Superior Court* (1947) 78 Cal.App.2d 19, 21 [177 P.2d 317]; *Agnew* v. *Superior Court* (1958) 156 Cal.App.2d 838, 840 [320 P.2d 158]), the marital communications privilege (Evid. Code, § 981; *People* v. *Pierce* (1964) 61 Cal.2d 879, 881 [40 Cal.Rptr. 845, 395 P.2d 893]), the physician-patient privilege (Evid. Code, §§ 997, 999) and the psychotherapist-patient privilege (Evid. Code, § 1018).

A second limitation upon the privilege is that enunciated as being constitutionally mandated in *Farr* and springs from the inherent power of the judiciary as a separate and coequal branch of our tripartite governmental structure to control its own proceedings and officers.[19]

[19]In *Wood* v. *Georgia* (1962) 370 U.S. 375 [8 L.Ed.2d 569, 82 S.Ct. 1364, 1369] the court said: "We still [illegible]

In *Farr*, a protective order which was substantially similar to the protective order in the case at bench was issued early in the proceedings of the Charles Manson murder case. Subsequent to the issuance of this order and while the trial was in progress, reporter Farr obtained copies of a written statement of one of the defense witnesses containing information which was highly inflammatory in nature and potentially damaging to the defendants in the trial. Farr admitted that the copies of the statement were supplied to him by two of six attorneys who were subject to the protective order and by an undisclosed third person who was also subject to the order. Farr told his potential sources of the statement that he would keep confidential the identity of the source. The written statements were subsequently published in the press. Much of the statement was later barred from evidence at trial.

After the trial, the court convened a hearing to determine whether there had been a violation of the order re publicity, which violation had jeopardized a fair trial for the defendants in the Manson case. Farr was called as a witness in the hearing and was asked to disclose the identity of the persons from whom he had obtained the statement. Farr refused, claiming immunity under Evidence Code section 1070. He similarly refused to answer questions seeking to ascertain the places where he had obtained the copies of the statement, the attorneys of record approached by him to obtain the statement and to whom he had given a promise of confidentiality of source, a question asking whether a source of the statement was an associate or an attorney of record, and a question asking whether a copy of the statement had been obtained from the office of the district attorney. He was cited for contempt and ordered jailed until he answered the questions. Additionally, the six attorneys testified that they did not give the statement to Farr.

In holding that Farr had no privilege to refuse to answer the questions posited, the court explained:

"The power of contempt possessed by the courts is inherent in their constitutional status. While the Legislature can impose reasonable restrictions upon the exercise of that power or the procedures by which it may be exercised (*In re McKinney*, 70 Cal.2d 8 [73 Cal.Rptr. 580, 447 P.2d 972]), it '[cannot] declare that certain acts shall not constitute a . . . contempt.' (*In re San Francisco Chronicle*, 1 Cal.2d 630, 635 [36 P.2d

business in an untrammeled way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions."

369].) Thus, former subdivision 13 of Code of Civil Procedure section 1209 which provided: '[N]o speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings' was held unconstitutional by our Supreme Court as an invalid legislative effort to abridge the inherent power of the court. *(In re San Francisco Chronicle, supra.)*

"If Evidence Code section 1070 were to be applied to the matter at bench to immunize petitioner from liability, that application would violate the principle of separation of powers established by our Supreme Court. That application would severely impair the trial court's discharge of a constitutionally compelled duty to control its own officers. The trial court was enjoined by controlling precedent of the United States Supreme Court to take reasonable action to protect the defendants in the Manson case from the effects of prejudicial publicity. (*Sheppard* v. *Maxwell*, 384 U.S. 333 [16 L.Ed.2d, 600, 86 S.Ct. 1507].) It performed its duty by issuing the order re publicity. By petitioner's own statement that order was violated by two attorneys of record, of a list of six counsel in the case. Those attorneys were officers of respondent court. By petitioner's own statement the violations occurred because of his solicitation. Respondent court was both bound and empowered to explore the violations of its order by its own officers. [Citations.]

"Without the ability to compel petitioner to reveal which of the six attorney officers of the court leaked the Graham statement to him, the court is without power to discipline the two attorneys who did so, both for their violations of the court order and for their misstatement to the court that they were not the source of the leak. Equally significant is the proposition that petitioner tarred six counsel with the same brush. Unless the court compels him to reveal which two of the six violated their professional obligation, four reputations of officers of the court will remain unjustly impaired.

"We thus conclude that Evidence Code section 1070 cannot be applied to shield petitioner from contempt for failure to reveal the names of the two attorneys of record in the Manson trial who furnished him with copies of the Graham statement. A closer question exists with respect to petitioner's refusal to divulge the identity of the third person, possibly not an attorney of record but subject to the order re publicity who gave him a copy of the statement. Here the court's power to compel an answer

in the face of Evidence Code section 1070 must rest primarily upon the necessity of disclosure as a means of enforcement of its obligation to prevent prejudicial publicity emanating from its attachés or the office of the prosecuting attorney. We conclude here, also, that section 1070 if applied to immunize petitioner from contempt would unconstitutionally interfere with the power and duty of the court. The record is clear that the only persons other than attorneys of record who had access to the Graham statement and who were subject to the order re publicity were attachés of the court and members of the district attorney's office. The mandate of the United States Supreme Court that the trial court control prejudicial publicity emanating from such sources (*Sheppard* v. *Maxwell, supra,* 384 U.S. 333) can be discharged only if that court can compel disclosure of the origins of such publicity." (*Farr* v. *Superior Court, supra,* 22 Cal.App.3d at pp. 69-71; fns. omitted.)[20]

We agree with these observations of the *Farr* court.

Thus the key to the court's power to compel an answer in the case at bench in the face of Evidence Code section 1070 is the necessity of exploring the violation of its orders by those subject thereto as a means of enforcing the court's constitutional obligation to prevent prejudicial publicity from emanating from its officers.

It is true that *Farr* is distinguishable on its facts, but we have concluded that it is not distinguishable on principle. As pointed out by petitioners, the primary distinguishing fact in *Farr* is that, in that case, through the testimony of Farr himself the court was aware that the persons who gave the information to Farr were court officers. The court was careful to point out that the holding is restricted to the facts, stating: "We express no opinion on the quantum of proof required to establish that inquiry into a newsman's source is necessary to permit the court to carry out its duty to control its own officers and to restrict persons subject to its control from disseminating prejudicial pretrial publicity. Here petitioner has admitted the necessary facts. Neither do we express an opinion on the validity of Evidence Code section 1070 where a possible source of the newsman's story contrary to a *Sheppard* [*Sheppard* v. *Maxwell,* 384 U.S. 333 [86 S.Ct. 1507]] order is other than an attorney of record, a court attaché, or the prosecutor's office" (22 Cal.App.3d at p. 71, fn. 5). In a sequel opinion written by the same judge (*In re Farr* (1974) 36 Cal.App.3d 577, 582 [111 Cal.Rptr. 649]), the court said: "In

[20]Contrary to the suggestion of the dissent, the *Farr* case does not turn upon nor is there any mention of a "waiver" in that case.

listing the sources as including two of six attorneys of record named by him, petitioner for the first time informed the court of facts which triggered its obligation to control its own officers." Seizing on this language, the petitioners in the instant case say that *Farr* is inapplicable because there was nothing to "trigger" the court's obligation to initiate an investigation of its officers since both the persons subject to the order and the petitioners, respectively, denied giving or receiving the transcript.

(10) We cannot agree with this crabbed view of the court's obligation and duty to assure a fair trial to the defendants by preventing release of potentially prejudicial publicity and to control its own officers and employees.

First, the court procedures were investigative and not adjudicative and were directed toward preservation of the precious constitutional right to a fair trial. Such an investigation should not be thwarted by narrowly construing the scope of the inquiry, and any doctrinal tension between the First Amendment and the Sixth Amendment resulting in an impasse must be resolved in favor of the relatively unrestricted constitutional right to a fair trial rather than in favor of the relatively limited invasion on freedom of the press caused by the necessity of revealing a relatively restricted category of news sources. (*Farr* v. *Superior Court, supra,* 22 Cal.App.3d at pp. 72-73.) Because the court's task is directed toward the protection of the constitutional right to a fair trial, its investigative power should necessarily be broad. (*Branzburg* v. *Hayes, supra,* 408 U.S. at p. 688 [33 L.Ed.2d at pp. 643-644, 92 S.Ct. at p. 2660].)

(11) Second, the factual difference between this case and *Farr* is one of degree, not principle. There, the admission by Farr that he got the protected statement from a person subject to the order, though those persons had denied it, "triggered" the court's obligation to investigate its own officers. In the instant case, the court had a precise record of the persons to whom copies of the transcript were originally delivered and entrusted, each being subject to the protective and seal orders; each of these persons denied at the hearing that he delivered the transcript or information relative to its contents to newspersons, and, though the petitioners denied receiving a copy of the transcript or information as to its contents from the only persons to whom a copy was originally delivered, it is undisputed that the statements which appeared in The Fresno Bee were directly quoted from the transcript. Faced with that unresolved mystery, petitioners would argue, the court thereupon

became powerless to conduct further investigation merely because the court's officers and the petitioners denied implication. We disagree. The court is not required to believe witnesses. More particularly, its investigation should not be truncated by mere denials of implication. As in other investigations and hearings, the court is authorized within the permissible scope of relevancy and absent applicable privileges to subject witnesses to penetrating interrogation in search of the truth. It would appear self-evident that if justification for instituting the investigation is grounded upon the need to assure a fair trial and to discipline those who have violated a court's orders, those needs are no less compelling because certain of the witnesses have denied a violation took place.[21]

While we cannot accept the view of petitioners that a court is totally impotent to proceed further once there has been a denial of implication by the court officers and by the press personnel, neither can we accept the view of respondent court that the protection afforded to the press by the privilege is totally emasculated by the necessity of the court to determine which of its officers violated the protective and seal orders. **(9b)** Consequently, we view the second limitation on the otherwise absolute protection afforded by the shield law (discussed *ante*) as being applicable only when the questions asked may tend to identify who, if anyone, *among those subject to a court's order,* may have violated it. The shield law still remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court.

(12) The key to the application of the above enunciated test is a determination on a question-by-question basis as to whether or not the answer to a question may tend to endanger the revelation of a protected source. To this end, within the rather narrow constrictions described above and even in the face of denials that court officers were involved, questions may continue to be asked if the answers may reveal that the source of the information was a court officer. Evidence Code section 1070 would not protect a refusal to answer this type of question. However, should a question be overbroad, i.e., it might tend to reveal that either a court official *or* a protected source was involved in the newsperson's

[21]As noted in *Branzburg* v. *Hayes, supra,* 408 U.S. at pp. 707-708 [33 L.Ed.2d at pp. 654-655, 92 S.Ct. at p. 2670], such investigations are, of course, subject to the requirements that they be instituted and conducted in good faith and that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."

obtaining of the information, the privilege under Evidence Code section 1070 would apply. Furthermore, a court is not entitled to ask questions directed toward discovering where the information did *not* come from (other than as they pertain to court officials) in order to narrow the field of inquiry vis-a-vis the protected sources. The court is only entitled to ask questions directed toward affirmatively determining if the information did come from court officers or attachés.

It appears to us that this solution accomplishes an equitable resolution of this difficult question by properly recognizing, protecting and accommodating the competing interests of newspersons in protecting their sources and of the judiciary in assuring criminal defendants' rights to a fair trial.

Because the abstract articulation of the test is somewhat abstruse, we believe its application to each of the questions asked petitioners will furnish clarification. Accordingly, we attach as Appendix "A" (See *post,* p. 242), a list of the 26 questions asked of Rosato, 25 questions asked of Patterson, 5 asked of Gruner and 17 asked of Bort, answers to which were refused, together with an indication of whether the questions should have been answered, and, in some instances, an explanatory comment.[22]

In arriving at these conclusions, we note that no issue has been raised by petitioners regarding the relevancy of the questions asked. It appears to us that no valid objection could be raised on this ground. In addition to being relevant on the issue of who, if anyone, among the court officers affirmatively delivered the transcript to newspersons, the questions asked were germane to the issue of any possible carelessness, indifference, neglect, connivance or collusion on the part of such officers in permitting the transcript to fall into the hands of petitioners; certainly the latter type of conduct would be subject to disciplinary action by the court.[23] Moreover, had a copy of the transcript, which was the source of the articles, been produced by petitioner Gruner pursuant to the subpoena duces tecum it could well have contained telltale variations or marks

[22]We realize that follow-up questions to the specific questions we have ruled upon herein will usually be asked, some of which could endanger a protected source. The test which has been enunciated should be carefully applied to each of such inquiries on a question-by-question basis to determine whether an answer is required. If each question is considered on its own merits and if the test is properly applied, we are satisfied no protected source will be in jeopardy.

[23]In this connection it is to be noted that while the protective order appears to be restricted to the prohibition of affirmative conduct, the seal order contains no such limitation.

revealing from which court officer the source material originated.[24] Of some significance is the fact that publication of the articles cast a pall of suspicion over the officers of the court that one or more of them had violated their professional and ethical duties as attorneys and court officers: the ones not responsible certainly have a legitimate interest in being exonerated by discovery and revelation of the truth.

DENIAL OF DUE PROCESS

As has been stated, the hearings out of which these proceedings arose were conducted over a period of time on January 24 and 27, on February 6 and on April 21 and 23, 1975. Petitioner Bort was first subpoenaed for appearance and testified at the April 21, 1975, hearing.

(13a) Basing their contentions on the allegation that commencing at the February 6, 1975, hearing, the inquiry below turned into an inquisition to inculpate petitioners in criminal conduct, petitioners contend that (1) the court lost jurisdiction to continue the hearing because the judicial branch has no authority to investigate crime and (2) because of the prosecution-like nature of the proceedings, petitioners were entitled to the full panoply of due process rights, including the right to notice of the charges against them and the right to call, to confront and to cross-examine witnesses.

(14) It is, of course, true that it is clearly not the function of the court to investigate criminal violations. The power to enforce the state's laws is vested in the Attorney General (Cal. Const., art. V, § 13), and the responsibility for investigating and prosecuting criminal activity is vested in the district attorney or the grand jury. (Gov. Code, § 26500; Pen. Code, § 917.) No one can institute criminal proceedings without the concurrence, approval or authorization of the district attorney. (*People* v. *Municipal Court (Bishop)* (1972) 27 Cal.App.3d 193, 204-206 [103 Cal.Rptr. 645].)

(13b) However, the fact, if it be a fact in the instant case, that the inquiry by the court incidentally reveals a suspicion of criminal activity which may result in criminal prosecutions of persons or witnesses does not inhibit the proceedings instituted for the purpose of determining who, if anyone, has violated the court's protective and seal orders. (See *Whitlow* v. *Superior Court* (1948) 87 Cal.App.2d 175, 182-184 [196 P.2d 590].)

[24] If the copy of the transcript contained telltale marks that would tend to reveal a protected source, a refusal to answer on that ground would be properly sustained.

A review of the facts and circumstances of the proceedings below convinces us that, while there was some suggestion that some of the petitioners may have been involved in criminal activity in procuring the transcript, the proceedings did not substantially deviate from the primary objective of ascertaining the identity of those persons who may have violated the court's orders. The suggestion of criminal activity was incidental to the accomplishment of the principal objective, and, manifestly, an investigation of potential crimes was not the purpose of the investigation; it is an extravagant exaggeration to assert that the proceedings became a criminal investigation or criminal prosecution within either the legal or commonly accepted definition of those terms.

(15) Amici curiae also contend that the investigative hearings should have been conducted before a judge other than the one who entered the protective order. They allege that on or about February 6 Judge Peckinpah of the respondent court became so personally embroiled in what he took as an attack upon his authority by the press that he could not impartially judge the contempts. We disagree.

It is to be noted that all of the contempt citations involved in these proceedings, except those of petitioner Bort who first appeared as a witness on April 21, resulted from refusing to answer questions at hearings conducted prior to February 6; petitioners in their brief impliedly concede that there was no prosecution-like hearing prior to the latter date. The matters which occurred on February 6 did not relate to petitioner Bort.

It is true that the court upon learning that petitioner Patterson had a master key to the courthouse stated at the February 6 hearing that the "inquiry must be broadened" and went on to warn the petitioners that "at the continued hearing on this matter, any refusal to answer questions . . . had better be based on your constitutional rights against self-incrimination . . . ," rather than on the First Amendment privilege or on Evidence Code section 1070. Also subsequent to the hearing on February 6, the judge of the respondent court issued a press release in which he characterized the press reaction to the case as either based on ignorance or constituting "a biased presentation." In the subsequent hearing on April 21 the judge made further reference to what he perceived to be media "pressure" addressed to him "individually."

While the judge's disseminating formal comments to the press concerning a matter pending before him was inappropriate, the judge's

impropriety in this respect does not invalidate the proceedings. Neither do we detect from those statements and conduct any prejudice in fact. Notwithstanding any impropriety, it appears in the actual conduct of the proceedings the judge was judicious and evenhanded. Moreover, petitioners either had to answer the questions or they did not, and, as we have indicated, the majority of these questions were not accusatory, were perfectly proper and should have been answered. It does not appear that any questions which may carry an accusatory overtone were asked during or after the February 6 hearing. The questions asked of petitioner Bort after February 6 were of the same tenor as those asked of the others prior to that date.

If the judge harbored a personal grievance against the petitioners, we are unable to perceive how or in what manner it affected the merits of the inquiry or the sentences imposed or that it had any impact upon the fairness of the proceedings.

(16) It is, of course, true that a criminal defendant when accused of crime is entitled to the due process rights mentioned, *ante*. However, at the investigatory stage (even by a grand jury which, of course, this is not) a potential defendant is not entitled to produce witnesses on his own behalf or to confront and cross-examine other witnesses, though under some circumstances such a person may be entitled to be warned of his rights against self-incrimination and to have counsel. (*United States* v. *Mandujano* (5th Cir. 1974) 496 F.2d 1050.)

Thus, as witnesses only, petitioners were not entitled to call and cross-examine witnesses or to object to questions.

However, notwithstanding the lack of any requirement that it do so (see *Whitlow* v. *Superior Court*, *supra*, 87 Cal.App.2d at p. 184), respondent court accorded petitioners herein the right to and they in fact had counsel throughout the proceedings, and their counsel was given the opportunity to submit to the court questions to be asked of witnesses, a privilege rarely exercised by petitioners' counsel and always observed except as to questions which had already been asked and answered.[25] While petitioners, as potential witnesses, were excluded from the courtroom during earlier hearings, pursuant to the authority of Evidence

[25]As to the questions which petitioners' counsel indicated the county counsel refused to ask, the questions were, pursuant to agreement with counsel, later asked of the petitioner Gruner instead of the petitioner Bort.

Code section 777, they were not excluded at any time during or after the February 6 hearing.

The record further reveals that none of the petitioners except Bort requested the opportunity to call witnesses in mitigation of punishment. As to Bort, contrary to petitioners' contention, he was given the opportunity to call witnesses in mitigation of punishment before sentence was passed.

Next, no substantial question can be raised that petitioners did not have notice of the proceedings or know what they were all about prior to any of the hearings.[26]

Additionally, petitioners were given notice of the charges and an opportunity to be heard prior to the imposition of the sentences for contempt and they make no claim that the procedural rights set forth in *In re Karagozian* (1975) 44 Cal.App.3d 516, 522-524 [118 Cal.Rptr. 793], were not complied with. All petitioners were given the opportunity to purge the contempts before sentences were passed.

Finally, the coercive rather than punitive sentence imposed by respondent court and authorized by Code of Civil Procedure section 1219[27] was less severe than that which the court could have imposed under Code of Civil Procedure section 1218.[28] Under this sentence the contemnor in a sense carries the key to his liberty in his pocket. It has

[26]In addition to widespread local publicity concerning the hearings, the declaration attached to the subpoena duces tecum served on Rosato, Patterson and Gruner prior to the hearing contained the following statement: "On November 21 and 22, 1974, the above court issued orders sealing the aforesaid transcript of the Grand Jury proceedings and prohibiting persons who were in possession thereof and certain others from divulging information regarding said Grand Jury proceedings. Subsequently, on January 12, 13 and 14, 1975, news articles appeared in The Fresno Bee purporting to quote from said sealed Grand Jury transcript. The court has set a hearing at the date and time first-above mentioned to determine whether or not its said order or orders have been violated. The copy of said transcript in the possession or under the control of said witness would probably establish that the court order or orders have in fact been violated and may establish who, if anyone, has violated such order or orders."

[27]Code of Civil Procedure section 1219 provides: "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he [has] performed it, and in that case the act must be specified in the warrant of commitment."

[28]Code of Civil Procedure section 1218 provides in pertinent part: "Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars ($500), or he may be imprisoned not exceeding five days, or both. . . ."

long been recognized as not being punishment but as an appropriate remedy to obtain necessary compliance from a recalcitrant and contemptuous witness. As such, the power would exist independently of statute. (*United States* v. *Mine Workers* (1947) 330 U.S. 258, 297-298, 330-332 [91 L.Ed. 884, 914-915, 931-933, 67 S.Ct. 677, 697-698, 713-715]; *In re Salkin* (1935) 5 Cal.App.2d 436 [42 P.2d 1041].)

STANDING, RES JUDICATA, AND LAW OF THE CASE

We reject respondent's threshold contentions that petitioners had no standing to challenge the validity of the protective and seal orders and that our ruling upon denial of a former petition by Rosato, Patterson and Gruner (William K. Patterson et al., petitioners, v. Superior Court of Fresno County et al., 5 Civil No. 2551) for a writ of prohibition to stop the inquiry below constitutes a bar to reconsideration of the issue raised in that petition at this time.

(17) Petitioners have standing under principles analogous to those expressed in *Craemer* v. *Superior Court* (1968) 265 Cal.App.2d 216, 218, fn. 1 [71 Cal.Rptr. 193]. Furthermore the hearings had their genesis in the protective and seal orders because the court derived its initial authority to conduct the hearings from alleged violations of those orders; therefore, petitioners' "injury" arose indirectly from those charged violations. It is patent that the petitioners have standing to challenge the jurisdiction of the court to hold hearings from which the contempt citations issued. (*State Bar of California* v. *Superior Court* (1929) 207 Cal. 323, 339-340 [278 P. 432].)

(18) With regard to the issue of res judicata and law of the case, it is to be noted that our former denial of a petition for a writ of prohibition to stop the inquiry below was a summary denial without issuance of an order to show cause and without oral argument. While it is true that the court accompanied the summary denial with an explanatory comment, we do not regard that comment as a formal opinion (Cal. Const., art. VI, § 14) precluding this court from considering the issue anew upon this hearing at which the parties have had an opportunity to brief and argue the case in full. (*People* v. *Shuey* (1975) 13 Cal.3d 835, 844-846 [120 Cal.Rptr. 83, 533 P.2d 211]; *People* v. *Medina* (1972) 6 Cal.3d 484, 490-492 [99 Cal.Rptr. 630, 492 P.2d 686].) One important incident to the right to appeal from a superior court's judgment is the right to present oral arguments before the appellate court. (Pen. Code, § 1254; Cal. Rules of Court, rules 22, 30; *People* v. *Medina, supra,* 6 Cal.3d at pp. 489-490.)

This right was denied petitioners in their prior petition for a writ of prohibition. We conclude that the absence of that right and the nature of the memorandum rendered, together with the fact we did not have the full record before us, precludes the application of principles which would prevent this court from full consideration of the issues at this time.

DISPOSITION

The judgments of contempt are annulled as to the questions appearing on Appendix "A" as numbers 8, 9, 11, 12, 13, 14, 15 and 23 asked of Rosato, numbers 3, 8, 11, 14, 20, 21, 22 and 24 asked of Patterson, and as numbers 9 and 10 asked of Bort. The judgments are affirmed as to the balance of the questions asked of each petitioner; in view of the understandable uncertainty as to the scope of the privilege, and believing the petitioners refused to answer the latter questions in good faith, fairness requires that the cause be and it hereby is remanded to the superior court for the purpose of affording each of the petitioners an opportunity to purge his contempts before his sentence is executed and for such further proceedings as may be appropriate under the circumstances.

Each party shall bear his or its own costs.

Gargano, J., concurred.

FRANSON, J., Concurring and dissenting.—I concur in the majority's holding that the respondent court had the right to make inquiry of petitioners as to whether a defendant or court officer had violated its order but that Evidence Code section 1070 gives to petitioners a privilege not to disclose the confidential source of their news stories except as the source was one of those persons. I also concur in the majority's recognition that the privilege should be given a broad rather than a narrow construction to the end that it [illegible] petitioners from contempt for refusing to answer [illegible]

to disclose a protected source. However, in spite of such declaration, in my view the majority unduly has restricted the privilege in its application to the questions put to petitioners. Further, the majority has wrongly upheld petitioners' contempt for refusing to answer questions which, while perhaps outside the privilege, clearly were beyond the subject matter of the inquiry. Finally, I believe that petitioners have a qualified First Amendment and California constitutional privilege of nondisclosure which gives added weight to section 1070 and required respondent to engage in a delicate balancing process before it could question petitioners as to the source of their information. For these reasons petitioners' contempt convictions should be reversed.

LIMITED SCOPE OF INQUIRY

Because the statute is to be broadly construed, the scope of a "Farr" type hearing is necessarily limited. The limitation results from the following considerations: first, the word "source" in section 1070 must be defined to include not only the identity of any person who may have furnished information to the newsmen, but also the information itself in whatever form it may have been received. Thus, if a copy of the transcript was given to petitioners, the copy is a protected source and petitioners cannot be compelled to disclose whether they received a copy of the transcript, nor can they be required to produce it for examination. On the other hand, if the petitioners did not receive a copy of the transcript but someone read its contents to them over the telephone, any records pertaining to that communication, either in the form of a tape recording, notes, or other memoranda, would be a "source" within the privilege. This interpretation is supported by the language of subdivision (c) of section 1070 which provides that privileged "unpublished information" includes notes, out-takes, photographs, tapes or other data of whatever sort, whether or not information based upon or related to such material has been disseminated.[1] While there is no California case in point, the Pennsylvania Supreme Court in *In re Taylor* (1963) 412 Pa. 32 [193 A.2d 181, 7 A.L.R.3d 580] in interpreting a similar statute has held that the right of nondisclosure of a "source of any information" received by a newsman includes not only the identity of the person furnishing the information, but documents, inanimate objects and all other possible sources in whatever form it may be.

[1]Evidence Code section 1070 not only provides a privilege for refusing to disclose the source of any information used for publication, but also for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public, and this is so whether or not published information based upon or related to such material has been disseminated. (Evid. Code, § 1070, subd. (c).)

Second, placing the burden on the newsman to prove that his answer will eventually lead to a disclosure of his source well may endanger the source and emasculate the privilege. This very problem was resolved by the United States Supreme Court in the context of the privilege against self-incrimination by holding that the witness need not satisfy the court that a criminal prosecution is likely to result from the answer because to do so might disclose the incriminating facts. It is enough that the witness simply shows a possible danger, even a *hypothetical one,* of incrimination. (Witkin, Cal. Evidence (2d ed. 1966) Witnesses, § 925, pp. 858-860.) The improbability of incrimination (in this case, the disclosure of a source) will not justify a denial of the privilege. "[I]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might be dangerous* because injurious disclosure *could result.*" (*Hoffman* v. *United States* (1951) 341 U.S. 479, 486-487 [95 L.Ed. 1118, 1123-1125, 71 S.Ct. 814, 818]; italics added.)

If a newsman is to be protected from a forced disclosure of any information which may tend to reveal a source of his story, it logically follows he cannot be compelled to reveal the form in which the information was received, the manner in which it was received, the time it was received, the place where it was received or which newsman received it. These questions cannot be answered, nor can the newsman give an intelligent explanation as to why they cannot be answered, without at least indirectly providing a clue or a link in the chain of evidence which would enable the interrogator to unlock the door to the source.

Third, to protect the privilege the newsman must avoid answering any questions which might result in an actual or constructive waiver of the privilege. By voluntarily answering questions as to some facts which would lead to the source, he will be held to have waived the privilege as to all other facts connected therewith. (See *Rogers* v. *United States* (1951) 340 U.S. 367 [95 L.Ed. 344, 71 S.Ct. 438, 442, 19 A.L.R.2d 378]; *In re Howard* (1955) 136 Cal.App.2d 816 [289 P.2d 537].) *Farr* is a clear example of such a waiver—by admitting that he had received the information from three persons subject to the court's order, Farr impliedly waived his right not to disclose their identities.

Fourth, because of the strong legislative policy behind section 1070 (majority opinion, pp. 217, 218) the broad definition of relevant evidence[2] cannot be utilized to restrict the privilege. Thus, even though an answer to a question might tend to exonerate a court officer from a suspicion of wrongdoing it is within the privilege if it also would tend to endanger a protected source.

The majority argues that questions "germane to the issue of any possible carelessness, indifference, neglect, connivance or collusion on the part of [court officers] in permitting the transcript to fall into the hands of petitioners" were relevant to the subject of the inquiry. Obviously, connivance or collusion on the part of a court officer would be pertinent because it would show a knowing violation of the order; however, mere carelessness, indifference or neglect, while perhaps tangentially relevant in that it indicates an absence of intentional wrongdoing by a court officer, nonetheless is within the privilege because it also might endanger a protected source. For example, if Mr. Goodwin "carelessly" left a copy of the transcript on his desk thus enabling a third party not subject to the order to transmit its contents to petitioners, forcing petitioners to answer questions concerning the episode would endanger the protected source.

Nor can I agree with the majority that because a question suggests possible criminal conduct by a petitioner and his source (apparently the theft of a public document) Evidence Code section 1070 does not apply. I find no authority for this proposition, and *Branzburg* v. *Hayes*, 408 U.S. 665 [33 L.Ed.2d 626, 92 S.Ct. 2646], does not so dictate. As stated by Justice White in his majority opinion: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." (408 U.S. at p. 682 [33 L.Ed.2d at pp. 639-640].) Again: "Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune . . . from testifying against the other, *before the grand jury or at a criminal trial.*" (408 U.S. at p. 691 [33 L.Ed.2d at p. 645]; italics added.) Thus, *Branzburg* had in mind only the giving of testimony by a newsman before a grand jury or at a pending criminal trial where his testimony would be relevant to the guilt or innocence of the person being investigated or charged with crime. Here, no such proceeding was in

[2]Evidence Code section [illegible] defines "relevant evidence" as evidence having any tendency [illegible] to prove any material fact that is of consequence to the action.

progress; the issue was not the guilt or innocence of petitioners or their source for violating a criminal statute.[3]

Moreover, the fact that Patterson had a master key to the courthouse at best raised an inference of criminal activity by Patterson or other representatives of the Bee which, if the trial court believed to be true, should have been turned over to the grand jury or the district attorney for investigation. As the majority acknowledges, it is not the function of a court to investigate a witness' possible criminal conduct nor is it contempt for a person to refuse to answer questions about matters over which the court has no jurisdiction or to which the testimony of the witness is neither pertinent nor material. (*State Bar of California* v. *Superior Court* (1929) 207 Cal. 323, 339-400 [278 P. 432].)

What all of this means is that once respondent questioned petitioners about whether they had received their information directly or indirectly from a person subject to the order and petitioners had fully answered these questions, pragmatically the *Farr* hearing came to an end. At this point, the court had two choices: either to accept the uncontradicted testimony or to reject it as untrue. If the court suspected that perjury had been committed, it should have turned the testimony over to the district attorney for a thorough investigation. Any suspected misrepresentation of fact by an attorney connected with the case could have been turned over to the State Bar for investigation.

Another very practical reason why the *Farr* hearing ends at this point is that it is exceedingly difficult if not impossible to frame a relevant question which, if not limited on its face to a court officer, cannot be construed to pertain at least indirectly to a protected source. Most of the questions in the appendix are within this category.

To the argument that this denouement places an undue restriction on the court's power to investigate the conduct of its officers and attachés, I respond that it is the only workable means of achieving an accommodation between the two competing interests without emasculating section 1070. The court's power of inquiry either must be limited as I have

[3]I have difficulty in perceiving the exact nature of the crime supposedly committed by petitioners. If they copied the contents of the transcript, a public document, while in a public office during working hours, there was no crime. (Code Civ. Proc., § 1888; Gov. Code, § 1227.) If they removed the transcript from a public office after hours there would be a trespass. However, the taking of a public document for the purpose of publishing its contents does not come within the traditional definition of theft; there is no intent to permanently deprive the owner, i.e., the public, of its property.

described it or it must be totally unrestricted as respondent believed it to be. The majority mistakenly has settled on a line somewhere between and has only deepened the sands of confusion.

Applying these rules to the questions in the appendix, Rosato questions Nos. 24, 25 and 26 and Patterson question No. 15 appear to be within the narrow exception to the privilege. The other questions to Rosato and Patterson, as well as the questions to Gruner and Bort, either are within the privilege or outside the scope of pertinent inquiry.[4] As to the four questions which should have been answered, in light of Patterson and Rosato's unequivocal testimony that neither they nor any Bee employee had obtained a copy of the transcript from any court officer or from any public office with the knowledge and consent of any of the persons covered by the order, I fail to see any sense in remanding the case so that they can answer these questions. Having in mind that "the good horse has been ridden to death," any remand would be an exercise in futility.

CONSTITUTIONAL PRIVILEGE AND THE BALANCING PROCESS

Evidence Code section 1070 is backed by and must be construed in the light of a newsman's qualified privilege under both the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.[5] Only by recognizing a constitutional privilege can the newsman's statutory right be fully protected. Justice Powell in his

[4]Rosato question No. 2, "Have you ever seen a copy of the grand jury transcript lying on Mr. Goodwin's desk, . . .?" is troublesome. On its face it appears to be harmless; it could be answered in the affirmative without endangering a source. If so answered, however, the next question would be, "When?", then, "Who else was present?", etc., thus narrowing the inquiry down to the point where a source could be endangered. The question is also confusing. If construed to mean did Rosato observe the transcript on Mr. Goodwin's desk in Goodwin's presence or with his knowledge, it would be pertinent to whether Goodwin violated the court's order. If the question is construed as referring to a time when Goodwin was not in his office and without his knowledge, it is not directly pertinent to whether Goodwin violated the order and, as previously explained, could lead to information which would indicate that a protected source aided Rosato in obtaining the transcript or its contents from Goodwin's desk. Rosato should not be forced to answer the question in its present form.

[5]In *Branzburg* Justice White observes that although Congress may determine privileges on the federal level, state legislatures are free within First Amendment limits to fashion their own standards, and state courts cannot be barred by the United States Supreme Court from "construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." (408 U.S. at p. 706 [33 L.Ed.2d at p. 654, 92 S.Ct. at p. 2669].)

concurring opinion in *Branzburg* referred to a balancing between the freedom of the press and the newsman's obligation to testify: "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." (408 U.S. at p. 710 [33 L.Ed.2d at p. 656, 92 S.Ct. at p. 2671].)

Other courts since *Branzburg* have recognized the First Amendment privilege. In *State* v. *St. Peter* (1974) 132 Vt. 266 [315 A.2d 254], the Supreme Court of Vermont held that a newsman is entitled to refuse to answer inquiries put to him in a deposition proceeding unless the interrogator could demonstrate that there is no other adequately available source for the information and that the information is relevant to the subject matter of the inquiry, in that case the defendant's guilt or innocence. The court stated: "But the language and attitude of the *Branzburg* majority does not indicate an entire absence of concern for the news-gathering function so relevant to the full exercise of the First Amendment. The opinion confines itself to grand jury proceedings and trials. It declines to pass upon appearance of newsmen before other bodies or agencies. Even more noteworthy, the concurring opinion of Mr. Justice Powell suggests that the First Amendment supports enough of a privilege in news-gatherers to require a balancing between the ingredients of freedom of the press and the obligation of citizens, when called upon, to give relevant testimony relating to criminal conduct." (315 A.2d at p. 255.)

In *Brown* v. *Commonwealth* (1974) 214 Va. 755 [204 S.E.2d 429], the Supreme Court of Virginia in a case where a criminal defendant had subpoenaed a newsman to give testimony held that the testimony sought was not essential to a fair trial and upheld the privilege. In *Baker* v. *F. & F Investment* (2d Cir. 1972) 470 F.2d 778, the plaintiffs moved for an order compelling disclosure of a journalist's confidential news sources in a federal class action under the Civil Rights Act involving alleged racial discrimination in the sale of houses to Negroes. It was held that the First Amendment rights would not be yielded to compel disclosure of the newsman's confidential source where disclosure was not essential to protect the public interest in the administration of justice and disclosure did not go to the heart of the plaintiff's case. In commenting on *Branzburg* it was said: "Manifestly, the Court's concern with the integrity

of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the case presently before us. If, as Mr. Justice Powell noted in that case, instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure." (470 F.2d at pp. 784-785.)

In *Democratic National Committee* v. *McCord* (D.D.C. 1973) 356 F.Supp. 1394 the court noted the requirement of an alternate source for the information which the plaintiff sought to obtain from the subpoenaed newsman and held that the alternative sources had not been exhausted or even approached in the case before it. In *Cervantes* v. *Time, Inc.* (8th Cir. 1972) 464 F.2d 986, a libel case was dismissed on summary judgment despite the fact that the newsman-author of the allegedly libelous article had refused to reveal his confidential sources.

When the disclosure of a confidential source is sought in a proceeding other than a grand jury investigation or a pending criminal trial (where the newsman's testimony is essential to an adjudication of the guilt or innocence of the defendant), *Branzburg* contemplates a qualified privilege to be applied on an ad hoc basis. While to date the full dimensions of the privilege are uncertain, I submit that under the principles articulated in *Branzburg* and its progeny, respondent court should not have tried to force a disclosure of the source of petitioners' news stories without balancing the following relevant factors:

(1) The potential inhibition or chilling effect on future news stories (*Branzburg* v. *Hayes, supra,* 408 U.S. 665 [33 L.Ed.2d 626, 92 S.Ct. 2646]).

(2) The public interest served by disclosure—in this case to determine if a court officer had violated its order so as to deter future violations. In this regard the court should have considered and weighed the fact that at the time petitioners were questioned there was no substantial fair trial issue in the pending criminal prosecutions against Stefano, Aluisi and Bains. Stefano and Aluisi's cases already had been transferred to other venues for trial; while Bains' case was still pending in Fresno, the substance of the charges against him as reflected in the news stories had been published on several prior occasions and it was extremely doubtful that any material in the January 12, 13 and 14 news stories would have further prejudiced Bains in the eyes of prospective trial jurors in Fresno

County. This is particularly so when we consider the fact that Bains, a former City of Fresno Planning Commissioner, previously had been indicted and convicted in a widely publicized Fresno County jury trial in May of 1974, of three counts of selling heroin and one count of possessing heroin. He was under a state prison sentence for these crimes when indicted by the grand jury in October 1974. Any concern for Bains' right to a fair trial in Fresno County should have been considered chimerical at best.

(3) The existence of alternate sources for the information. The examination of the court officers showed that many persons not questioned had access to copies of the transcript. Having in mind the importance of the First Amendment privilege it seems only reasonable to require that before petitioners were forced to disclose any information concerning their sources that these other possible sources should have been explored.

(4) The relevance of the inquiry. As previously explained, the subject of the inquiry was whether a court officer knowingly had violated the order; it necessarily follows that respondent should have evaluated each question in light of this limitation. Only respondent was in a position to protect petitioners' interests by limiting the questions to those that were pertinent to the inquiry.

(5) The impact of the inquiry on the rights of others. Here the court should have considered the public's right to know the substance of certain portions of the grand jury transcript. In response to a question as to why the offending news stories were published, Mr. Gruner stated: "Well, we felt that there was an important public matter dealt with in all the articles because they were interrelated; one of the principal items being the possibility that the garbage franchise might be brought up before the City Council, and Mr. Stefano was a sitting member of that Council, and his testimony with regard to possible conflict of interest, we felt, was a significant matter of which the public was entitled to know. And the other articles dealt with the functions that the alleged activities of the public—of a public official, whose performance was entitled to be judged by the public that he serves, in the light of all facts that are known concerning his activities, and we, having weighed the factor of the right to a fair trial, felt that in this instance the rights of the defendants would not be impaired in that regard since the venue change had already been indicated in the case of two of the individuals and that the information with regard to the third defendant was not of significant

difference from material that had been published prior to the Grand Jury proceedings." Manifestly, the trial court should have weighed the public's right to know about Stefano's prior activities concerning matters then pending before the council, as evidenced by sworn testimony before the grand jury, a judicial body, against the court's need to force a disclosure of the source of the news story. The public's interest in knowing about this testimony should not have been ignored.

The record indicates that the respondent court failed to take any of these factors into consideration before it questioned petitioners. It simply ruled that under *Farr,* Evidence Code section 1070 was an "unconstitutional interference" with the court's investigative powers, and it had an unlimited right to ask any questions which would lead it to the source of the news stories, whoever or whatever the source might be.

Moreover, respondent should have reweighed the factors enumerated above after it had received petitioners' sworn testimony that they had not received any of their information directly or indirectly from any person subject to the order and before it broadened the inquiry to include the possible criminal conduct of petitioners. At this point, because there was no evidence suggesting that petitioners had obtained their information from anyone subject to the court order, in fact all of the evidence was to the contrary, respondent well might have concluded that any need to make further inquiry into petitioners' sources had ended. The court had fully accomplished its purpose of protecting the integrity of its judicial process.

The majority and dissenting opinions have assumed the validity of respondent's order sealing the transcript. However, I believe it is appropriate to note that a concern recently has been voiced by the American Bar Association's Legal Advisory Committee on Fair Trial and Free Press for the procedures generally used by a trial court in issuing restrictive orders re publication. In its preliminary draft of "Proposed Court Procedure for Fair Trial-Free Press Judicial Restrictive Orders" (July 1975), the committee states: "Until now the courts have rather uniformly treated any kind of restrictive order preventing disclosure and publication of information as outside of the procedural requirements applicable generally to the issuance of restraining orders and injunctions. Many restrictive orders across the country, in both state and federal courts, have been entered without notice and without hearing. In some instances, these orders have been issued on the eve of trials, or invoked orally during the trial. Generally no one has appeared

before the court to assert the free press right in the First Amendment. This results in orders being entered without a full exploration and understanding of the delicate balance between the constitutional requirements for a fair trial, a public trial, and a free press." (Op. cit. p. 2.)

Under the ABA committee's proposed procedure, law enforcement agencies, public defenders, district attorneys *and local news media* would receive notice of the proposed restrictive order accompanied by a notice giving the time within which written comments shall be received and the time for hearing any objections to the proposed order. (Op. cit. p. 9.) While any requirement that a trial court must give notice to the press with respect to restrictive orders on evidentiary matters arising during the course of a criminal trial would impose an unworkable burden on the trial court and unduly delay the progress of the trial, I suggest that such a rule would be beneficial to the courts and the public insofar as the issuance of any blanket pretrial injunction against publication of a grand jury transcript as in the present case. It must be kept in mind that often months and sometimes years pass before an indictment is brought to trial. There is something inherently wrong in allowing a court to prohibit the dissemination to the public of sworn testimony concerning misconduct by a public official who remains in office and votes on issues pertinent to the substance of the testimony without giving the public, through the press, the right to be heard on the matter. If such a procedure had been followed, respondent might have issued a limited order enjoining publication of only selected portions of the transcript but permitting publication of those portions pertinent to Mr. Stefano's continuing activities as a city councilman and which the public had the right to know about. I suggest our Supreme Court should consider promulgating such a rule which perhaps would tend to minimize future acrimonious controversies between the courts and the press.

In summary, petitioners' contempt convictions should be reversed for two reasons: first, with only four exceptions, the questions which they refused to answer exceeded the limited scope of permissible inquiry of whether a court officer or attaché violated the court's order. With the exceptions noted, the petitioners answered all pertinent questions in this area. Second, the respondent court failed to engage in the balancing process required to protect petitioners' constitutional and statutory privileges not to reveal the source of their news stories.

APPENDIX "A"

QUESTIONS WHICH JOE ROSATO REFUSED TO ANSWER

1. Are the passages in those articles which are set forth in quotation marks, in fact, direct quotations from that grand jury transcript?
ANSWER REQUIRED? Yes.
COMMENT: Question is preliminary in nature.
2. Have you ever seen a copy of the grand jury transcript lying on Mr. Goodwin's desk, Mr. Hugh Goodwin?
ANSWER REQUIRED? Yes.
COMMENT: Since Mr. Goodwin is a court officer, the answer may lead to identifying him as a violator of the orders. It does not endanger revealing the identity of protected sources not falling within the narrow exceptions to the broad protection afforded by the privilege. It is relevant to the negligence or other punishable conduct by court officers.
3. When you and Mr. Patterson were writing the stories marked Exhibits 2, 3, and 4, did you refer to the grand jury transcript?
ANSWER REQUIRED? Yes.
4. In writing those articles, did Mr. Patterson and in your presence refer to the grand jury transcript?
ANSWER REQUIRED? Yes.
5. Mr. Rosato, have you ever read the grand jury transcript?
ANSWER REQUIRED? Yes.
6. Did you ever see that transcript in the possession of Bill Patterson?
ANSWER REQUIRED? Yes.
7. From whatever the source, Mr. Rosato, are you the person who obtained the copy of the grand jury transcript used in writing the news articles referred to in Exhibits 2, 3, and 4?
ANSWER REQUIRED? Yes.
COMMENT: The answer to this question does not endanger the revelation of a source outside the range of court officers covered by the order but would either identify or not identify Rosato as the individual who obtained the grand jury transcript or information from the grand jury transcript used in the newspaper articles.
8. Mr. Rosato, did you arrange to obtain for the Bee a copy of the grand jury transcript from some outside source?
ANSWER REQUIRED? No.
COMMENT: This question is too broad and is protected by the privilege in that it endangers revealing the source outside the relatively small group of persons subject to the order and tends to narrow the field of inquiry vis-a-vis the protected sources.
9. To your knowledge, was a messenger used in transmitting a copy of the grand jury transcript to officers or employees of the Bee from an outside source?
ANSWER REQUIRED? No.
COMMENT: See comment under question No. 8.
10. Was the grand jury transcript obtained by you from the office of one of the persons or classes of persons mentioned, again going clear back to the defendants, without their knowledge or consent?
ANSWER REQUIRED? Yes.
COMMENT: See comment under question No. 2.
11. Was a copy of the transcript taken, to your knowledge, from a public office by an agent or employee of McClatchy Newspapers without knowledge or consent of the person having custody or control of that copy?
ANSWER REQUIRED? No.
COMMENT: If the question had been limited to the office of the person subject to the order it would have had to be answered. However, the term "public office" may

conceivably extend to some public offices and officers who were not subject to the order; hence it would endanger a source which is protected by the privilege.
12. Did you make or have you made a promise to the source of the grand jury transcript obtained by the Bee that the identity of the source would not be revealed?
ANSWER REQUIRED? No.
COMMENT: The question is immaterial, but petitioner has offered to answer this question.
13. To your knowledge, did the source, person from whom any grand jury transcript was obtained, make the initial contact offering that transcript?
ANSWER REQUIRED? No.
COMMENT: See comment under question No. 8.
14. Where were you when you first received a copy of the grand jury transcript?
ANSWER REQUIRED? No.
COMMENT: See comment under question No. 8.
15. Did you first come into possession of a copy of the transcript in the Fresno County Courthouse?
ANSWER REQUIRED? No.
COMMENT: See comment under question 8. Note, if the question had been restricted to one of the offices of the persons subject to the order it should have been answered.
16. When did you first come into possession of a copy of the grand jury transcript?
ANSWER REQUIRED? Yes.
COMMENT: Question is preliminary.
17. When did you first come into possession of a copy of those statements which are enclosed in quotation marks and contained in Exhibits 2, 3, and 4?
ANSWER REQUIRED? Yes.
COMMENT: Question is preliminary.
18. Yes, you did, Mr. Rosato, and that declaration, I think, will show that it was stated that at the time you signed the declaration you did not have a copy of the transcript in your possession or under your control, but I ask you now, under oath, have you ever had a copy of the grand jury transcript in your possession or under your control?
ANSWER REQUIRED? Yes.
19. To your knowledge, does anyone employed or associated with McClatchy Newspapers now have a copy of the grand jury transcript?
ANSWER REQUIRED? Yes.
20. Have you ever been in the office of the Public Defender at a time when that office was not open to the public?
ANSWER REQUIRED? Yes.
COMMENT: See comment under question No. 2.
21. Have you ever been in the office of the District Attorney when that office—at a time when that office was not open to the public?
ANSWER REQUIRED? Yes.
COMMENT: See comment under question No. 2.
22. Have you, including the office of the County Clerk, have you ever been in the office of any of the classes of persons mentioned awile ago which you've stated you recall, at a time when those offices were unoccupied by anyone else?
ANSWER REQUIRED: Yes.
COMMENT: See comment under question No. 2.
23. Did you obtain a copy of a grand jury transcript after you were served with the subpoena I showed you just before the noon break?
ANSWER REQUIRED? No.
COMMENT: Question is irrelevant.
24. If I can repeat it, has any officer or employee of the Bee told you, in effect, that he personally took a copy of the grand jury transcript from any of the persons in that class of persons we have discussed earlier?

ANSWER REQUIRED? Yes.
COMMENT: See comment under question No. 2.

25. Have you seen any employee take a copy of the grand jury transcript from the office of any of the persons mentioned in that class of persons?
ANSWER REQUIRED? Yes.
COMMENT: See comment under question No. 2.

26. Do you know whether or not any employee of the Bee has obtained a copy of the transcript from any of the persons mentioned in that class of persons?
ANSWER REQUIRED? Yes.
COMMENT: Rosato has offered to answer this question.

QUESTIONS WHICH WILLIAM K. PATTERSON REFUSED TO ANSWER

1. Had he [Rosato] acquired any materials helpful in writing stories stated there in Exhibits 2, 3 and 4, which caused you to ask for his help?
ANSWER REQUIRED? Yes.

2. Are any of the statements contained in quotation marks in Exhibits 2, 3, and 4 quotations from the grand jury transcript?
ANSWER REQUIRED? Yes.

3. Have you, on any occasion other than what you've already described, seen a copy of the grand jury transcript?
ANSWER REQUIRED? No.
COMMENT: See comment to Rosato question No. 8.

4. Have you read the grand jury transcript?
ANSWER REQUIRED? Yes.

5. Have you read any portion of it [grand jury transcript]?
ANSWER REQUIRED? Yes.

6. Have you ever had the transcript in your possession?
ANSWER REQUIRED? Yes.

7. When you and Mr. Rosato were jointly writing the stories, Exhibits 2, 3, and 4, did you refer to a copy of the transcript?
ANSWER REQUIRED? Yes.

8. When you had completed writing Exhibits 2, 3, and 4, what did you do with any materials used in writing those matters which are contained in those news articles in quotation marks?
ANSWER REQUIRED? No.
COMMENT: The question is too broad. It may require an answer which would compel a revelation that the transcript was returned to a protected source.

9. As between you and Mr. Rosato, who first acquired the material used in writing those statements contained in the exhibits last mentioned in quotation marks?
ANSWER REQUIRED? Yes.

10. From whatever the source, are you the person who obtained the materials which are contained in those news articles in quotation marks?
ANSWER REQUIRED? Yes.
COMMENT: See comment to Rosato question No. 7.

11. Was a copy of the grand jury transcript obtained from a source outside the Bee through your efforts?
ANSWER REQUIRED? No.
COMMENT: See comment to Rosato question No. 8.

12. Did Mr. Rosato obtain a copy of the grand jury transcript to your knowledge?
ANSWER REQUIRED? Yes.
COMMENT: See comment to Rosato question No. 7.

13. To your knowledge, was more than one copy of a grand jury transcript obtained by officers or employees of the Bee from outside sources?
ANSWER REQUIRED: Yes.

14. Do you know how the materials used in writing those statements contained in quotation marks in those news articles was obtained for the Bee?
ANSWER REQUIRED? No.
COMMENT: See comment to Rosato question No. 8.

15. Has any employee of the Bee told you, in effect, that he personally took a copy of the grand jury transcript from the office of any of the persons or classes of persons mentioned a moment ago?
ANSWER REQUIRED? Yes.
COMMENT: See comment under Rosato question No. 2.

16. Has Mr. Rosato told you, in effect, that he obtained a copy of the grand jury transcript from the office of one of those persons or classes of persons without their knowledge or consent?
ANSWER REQUIRED? Yes.
COMMENT: See comment under Rosato question No. 2.

17. Have you seen an officer or employee of the Bee take a copy of the grand jury transcript from the office of one of the persons or classes of persons mentioned a moment ago without the knowledge or consent of such person or class of persons?
ANSWER REQUIRED? Yes.
COMMENT: See comment under Rosato question No. 2.

18. Has any officer or employee of the Bee told you that within the last three months he was in Mr. Goodwin's office when Mr. Goodwin was not present?
ANSWER REQUIRED? Yes.
COMMENT: See comment under Rosato question No. 2.

19. Has Mr. Rosato told you that within the last three months he has been in Mr. Goodwin's office at a time when no one else was present?
ANSWER REQUIRED? Yes.
COMMENT: See comment under Rosato question No. 2.

20. To your knowledge, has any promise been made to the source of the grand jury transcript in the possession of the Bee that the identity of the source would not be revealed?
ANSWER REQUIRED? No.
COMMENT: The question is immaterial.

21. Where did you first see it [the grand jury transcript]?
ANSWER REQUIRED? No.
COMMENT: See comment under Rosato question No. 8.

22. Were you in a public office, that is, the office of a public officer when you first came into possession of the statements contained in quotation marks and contained in those exhibits, 2, 3, and 4?
ANSWER REQUIRED? No.
COMMENT: The question would have been proper if it had been restricted to the office of a public officer who was subject to the orders.

23. When did you last have in your possession or under your control a copy of the materials used in writing the matters which are contained in quotation marks in those articles?
ANSWER REQUIRED? Yes.

24. When you completed writing the news articles Exhibit 2, 3, and 4, what did you do with the document used in writing the matter contained in those quotation marks and those articles?
ANSWER REQUIRED? No.
COMMENT: See comment under question No. 8.

25. To your knowledge, does anyone employed or associated with McClatchy Newspapers now have a copy of the grand jury transcript?
ANSWER REQUIRED? Yes.

QUESTIONS WHICH GEORGE GRUNER REFUSED TO ANSWER

1. Have you read a copy of the grand jury transcript?
ANSWER REQUIRED? Yes.
2. Do you have in your possession or under your control now a copy of the grand jury transcript?
ANSWER REQUIRED? Yes.
3. Did you bring with you to court today a copy of the grand jury transcript, of any copy of a grand jury transcript in your possession or under your control?
ANSWER REQUIRED? Yes.
4. Mr. Gruner, do you know who obtained for the Bee a copy of the grand jury transcript, who within your organization?
ANSWER REQUIRED? Yes.
5. Do you have a copy of the materials used by Mr. Patterson and Mr. Rosato in writing the news articles marked Exhibits 2, 3, and 4?
ANSWER REQUIRED? Yes.

QUESTIONS WHICH JAMES H. BORT, JR., REFUSED TO ANSWER

1. Was the source material in the form in which it was first acquired by an officer or employee of McClatchy Newspapers in Xerox copy form?
ANSWER REQUIRED? Yes.
2. When did you first see the source material?
ANSWER REQUIRED? Yes.
3. When did you last see the source material?
ANSWER REQUIRED? Yes.
4. Did the source material in the form in which it was obtained contain any underlining—?
ANSWER REQUIRED? Yes.
5. Did the source material in the form in which it was obtained contain any marginal notations?
ANSWER REQUIRED? Yes.
6. Did the source material in the form in which it was obtained contain any handwriting or pen or pencil markings of any kind?
ANSWER REQUIRED? Yes.
7. Was written source material used in writing Exhibits 2, 3 and 4?
ANSWER REQUIRED? Yes.
8. Did you see the source material before those news articles, Exhibits 2, 3 and 4, were written?
ANSWER REQUIRED? Yes.
9. Was the Bee's first copy of the source material made in the Fresno County courthouse?
ANSWER REQUIRED? No.
COMMENT: See comment to Rosato question No. 11.
10. Was the Bee's first copy of the source material made on a county copy machine with knowledge or consent of a county employee?
ANSWER REQUIRED? No.
COMMENT: See comment to Rosato question No. 11.
11. Was the source material first obtained by an officer or employee of McClatchy Newspapers between 8:00 o'clock a.m. and 5:00 o'clock p.m. on a weekend or on a weekend?
ANSWER REQUIRED? Yes.
12. Was a copy of the grand jury transcript used in writing Exhibits 2, 3 and 4?
ANSWER REQUIRED? Yes.
13. Who in your organization last had the source materials, according to your

information?
ANSWER REQUIRED? Yes.
14. After writing Exhibit 2, 3 and 4 articles, did Mr. Rosato or Mr. Patterson turn the source material over to you?
ANSWER REQUIRED? Yes.
15. Do you know whether or not Mr. Patterson had in his possession or under his control a copy of the source material at the time he was served with the subpoena duces tecum prior to the January 24, 1975 hearing in this matter?
ANSWER REQUIRED? Yes.
16. Do you know whether or not Mr. Rosato had in his possession or under his control a copy of the source material at the time he was served with a subpoena duces tecum prior to the January 24, 1975 hearing in this matter?
ANSWER REQUIRED? Yes.
17. Do you know whether or not Mr. Gruner had in his possession or under his control a copy of the grand jury transcript at the time he was served with the subpoena duces tecum prior to the January 24, 1975 hearing in this matter?
ANSWER REQUIRED? Yes.

Exhibit B

ORDER DUE
December 5, 1975

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

5th District, Division --, Civil No. 2623

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ROSATO ET AL.

v.

THE SUPERIOR COURT OF FRESNO COUNTY

Petition for hearing DENIED.

Mosk, J., is of the opinion that the petition should be granted.

[illegible] Wright
Chief Justice

Exhibit "C-1"

(Respondent's order pursuant to defense motion to seal the grand jury transcript. Order dated November 21, 1974.)

"IT IS ORDERED:

Motion to Seal Transcript is granted & Transcript ordered sealed."

Exhibit "C-2"

In the Superior Court of the State of California
in and for the County of Fresno

Case No. 28498

The People of the State of California,
Plaintiff,

vs.

Marc A. Stefano, Julius Aluisi, Norman Bains,
Defendant.

ORDER RE PUBLICITY

The Grand Jury having returned an indictment in this matter on October 31, 1974, and the Court having set the same for trial, the Court is now in a legal position to make certain orders respecting this matter.

Under our Constitution, each defendant is entitled to the due process of the law and to a fair trial. This Court has an affirmative duty to do everything possible within its constitutional powers and jurisdiction to make certain that each defendant does receive a fair trial.

In order to fulfill that constitutional duty to guarantee that the defendants and each of them does receive a fair trial, and because of the obvious public interest in this matter which has produced massive news media publicity, it further appearing to the Court that the dissemination by any means of public communication of any out-of-court statements relating to this case may interfere with the constitutional right of the defendants to a fair trial and disrupt the proper administration of justice, the Court hereby issues the following orders, a violation of which will result in immediate action to punish for contempt any offender within the jurisdiction of this Court.

IT IS THE ORDER OF THIS COURT that no party to this action nor any attorney connected with this case as defense counsel or prosecutor, nor any other attorney, nor any judicial officer or employee, nor any public official, including but not limited to any chief of police, nor any sheriff, nor any agent, deputy, or employee of any such person, nor any grand juror, nor any witness having appeared before the Grand Jury in this matter, nor any person subpoenaed to testify at the trial of this matter, shall release or authorize the release for public dissemination of any purported extra-judicial statement of the defendants or witnesses relating to the case, nor shall any such person release or authorize the release of any documents, exhibits, or any evidence, the admissibility of which may have to be determined by the Court, nor shall any such person make any statement for public dissemination as to the existence or possible existence of any document, exhibit, or any other evidence, the admissibility of which may have to be determined by the Court. Nor shall any such persons express outside of court an opinion or make any comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence. Nor shall any such persons make any statement outside of court as to the nature, substance, or effect of any testimony that has been given. Nor shall any such persons issue any statement as to the identity of any prospective witness, or his probable testimony, or the effect thereof. Nor shall any person make any out-of-court statement as the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter. Nor shall any person or witness, whether or not under subpoenas, make any statement as to the content, nature, substance, or effect of any testimony

which may be given in any proceeding related to this matter, except that a witness may discuss any matter with an attorney of record or agent thereof.

This order does not include any of the following:

1. Factual statements of the accused person's name, age, residence, occupation, and family status.

2. The circumstances of the arrest, namely, the time and place of the arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation.

3. The nature, substance, and text of the charge, including a brief description of the offenses charged.

4. Quotations from, or any reference without comment to, public records of the Court in the case, or to other public records.

5. The scheduling and result of any stage of the judicial proceeding held in open court in an open or public session.

6. A request for assistance in obtaining evidence.

7. Any information as to any person not in custody who is sought as a possible suspect or witness, nor any statement aimed at warning the public of any possible danger as to such person not in custody.

8. A request for assistance in the obtaining of evidence or the names of possible witnesses.

Further, this order does not preclude any witness, or potential witness from discussing any matter in connection with the case with any of the attorneys representing the defendant or the People, or any representative of such attorneys.

It is further ordered that a copy of this order be attached to any subpoena served on any witness in this matter, and

that the return of service of the subpoena shall also include the fact of service of a copy of this order.

This order shall be in force until this matter has been disposed of or until further order of Court.

Dated: November 22, 1974.

DENVER C. PECKINPAH
Judge

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75919

JOE ROSATO, WILLIAM K. PATTERSON,
GEORGE F. GRUNER and JIM BORT,
Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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No. 75919

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Petitioners,

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

I.

QUESTIONS PRESENTED

The respondent Superior Court views the questions presented as follows:

1. Whether there is any conflict in the cases, requiring resolution by this Court, as to the standard to be followed by trial courts in issuing protective orders re publicity.

2. Whether this Court should issue an advisory opinion regarding a newsperson's conditional First Amendment privilege.

3. Whether an interpretation by California courts that a California statute violates the California Constitution presents an issue reviewable by this Court.

4. Whether petitioners were accorded due process when called as witnesses in a hearing before the respondent court.

II.

STATEMENT OF THE CASE

Petitioners in this case are newsmen for The Fresno Bee, a daily newspaper in Fresno, California. Respondent is the Superior Court of Fresno County. Petitioners were held in contempt by the Superior Court for refusing to answer questions asked of them during the course of an investigation into the apparent violation of a protective order re publicity entered by that court in a criminal case. The questions petitioners refused to answer, and which the California Court of Appeal, Fifth Appellate District, ruled they were required to respond to, were framed to ascertain only if the newsmen's news source was a person subject to and in violation of the Court's order.

In October 1974 the Fresno County Grand Jury jointly indicted Fresno City Councilman Marc Stefano, land developer Julius Aluisi and former City of Fresno Planning Commissioner Norman Bains on counts of bribery and conspiracy. The original and four copies of the grand jury transcript were delivered by the court reporter to the county clerk, who in turn delivered one copy to the district attorney, one copy to the defendant Stefano, one copy to the attorney for defendant Aluisi, and one copy to the Assistant Public Defender who was the attorney for defendant Bains. The

original was retained in the county clerk's safe except when it was in possession of the court. (Opinion, 51 Cal.App.3d at 199-200)[1]

On November 13, 1974, defendant Aluisi's attorney made an oral motion before the respondent court to seal the grand jury transcript on the ground that there would be extensive adverse publicity prejudicing his client if the transcript became public. The district attorney did not oppose the motion and the court took the matter under submission. (RT of Hearing, November 13, 1974, p. 2-7). On November 21, 1974, one day before the grand jury transcript normally would have been made public, the other two defendants joined in Aluisi's motion. Again, the district attorney did not oppose the motion and the motion was granted. All three defendants then moved the court to issue a broader protective order re publicity. (RT of Hearing, November 21, 1974, p. 2-4) On November 22, 1974, the court issued such an order. (RT of Hearing, November 22, 1974, p. 2-7)

That order, after reciting the necessity to protect the defendants' right to due process of law and to a fair trial and noting that "it further appearing to the Court that the dissemination by any means of public communication of any out-of-court statements relating to this case may interfere with the constitutional right of the defendants to a fair trial and disrupt the proper administration of justice . . ." directed that no party, attorney, judicial officer or employee, law enforcement officer, grand juror, witness before the grand jury nor any person subpoenaed to testify at trial should make any out of court statements regarding

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1. The opinion of the California Court of Appeal, Fifth Appellate District, is reproduced as Exhibit A in the Appendix to the petitioning newsmen's brief. The opinion contains most of the relevant facts.

the evidence in the case. (Opinion, 51 Cal.App.3d at 200-201)[2]

Defendant Stefano's motion for change of venue in the criminal matter was granted on January 3, 1975, and a like motion was granted upon the motion of defendant Aluisi on January 7, 1975. Defendant Bains' criminal trial was never transferred from Fresno County (Opinion, 51 Cal. App.3d at 201).

On January 12, 13 and 14, 1975, stories under petitioners Rosato's and Patterson's bylines appeared on the front page of The Fresno Bee quoting extensively from the sealed grand jury transcript. (Opinion, 51 Cal.App.3d at 201)

It appearing to the respondent court that there had been a violation of the court orders, the court directed the county counsel to represent the court in proceedings concerning the apparent violation of its orders. The hearings were held on January 24 and 27, February 6, April 21 and 23, 1975.

Petitioners Rosato and Patterson, reporters for The Fresno Bee, and Gruner, Managing Editor of The Bee, were served with a subpoena duces tecum directing them to produce at the hearings any copy of the grand jury transcript which they might have in their possession or under their control. A motion to quash the subpoena was filed by their counsel, and in support thereof, a declaration of petitioner Gruner which alleged that the articles were derived from confidential news sources; Gruner did not produce the transcript. The court denied the motion to quash. One of the contempt citations was based upon Gruner's failure to produce the transcript. (Opinion, 51 Cal.App.3d at 201-202)

2. The two court orders will be referred to hereafter in the singular for simplicity.

Prior to calling petitioners as witnesses at the hearings, the assistant county counsel called 13 witnesses who had lawful access to the grand jury transcript and who were subject to the court order. During the direct examination of all witnesses, petitioners and all other witnesses were excluded from the courtroom except when they themselves were testifying. Counsel for petitioners, though, were permitted to remain in the courtroom and were allowed to cross-examine witnesses through a procedure whereby questions would be submitted to the assistant county counsel to be asked by him at his discretion.

Each of these 13 witnesses testified that he or she had no knowledge or information as to how any newsperson obtained a copy of any portion of the grand jury transcript.

Thereupon, petitioners Rosato, Patterson and Gruner were called as witnesses, each of whom was permitted to consult frequently with his counsel, and each of whom was informed of the identity of the prior witnesses and of their statements and of the fact that each prior witness had testified that he had no objection to the disclosure by newsmen of the source of The Fresno Bee articles. (Opinion, 51 Cal.App.3d at 202-203)

Each of the three petitioners, Rosato, Patterson and Gruner, testified that he did not obtain the "source material" for the articles from one of the persons subject to the protective order. All four of the petitioners, however, refused to answer numerous specific questions framed to determine if the "source material" had in fact come from such a person. (Opinion, 51 Cal.App.3d at 203-205)[3]

As a consequence of refusing to answer questions during the hearings, Rosato was cited 26 times for contempt, Pat-

3. The specific questions the petitioning newsmen refused to answer are listed in the Opinion at 51 Cal.App.3d at 242-247.

terson was cited 25 times, Gruner was cited 5 times, and Bort was cited 17 times.

Upon review of the sentences, the California Court of Appeal for The Fifth Appellate District annulled 18 of those citations and affirmed as to the balance. The case was ordered remanded to allow petitioners the opportunity to purge their contempts. (Opinion, 51 Cal.App.3d at 231)

III.

THERE IS NO CONFLICT IN THE CASES REGARDING THE ENTRY OF PROTECTIVE ORDERS

In their first point, the newsmen argue that a conflict exists between various California courts and federal Courts of Appeal as to the appropriate standard to be used by the trial courts in determining whether the entry of a protective order is justified. They contend that some courts require that potential publicity present a clear present danger to the fair administration of justice before a protective order is entered, whereas other courts have concluded that a protective order is warranted where there is a reasonable likelihood of publicity tending to prevent a fair trial.

A cursory reading of the relevant cases leads one to the conclusion that there is in fact no conflict. The two different tests, to the extent that the articulation of them even expresses a substantive difference, have arisen out of and been consistently applied in different categories of factual settings. The "clear present danger" test has been used when there was a prior restraint made specifically applicable to publication by the news media, and it has been used in cases where overbroad local court rules or court orders were drawn up restricting comment by various persons without regard to the nature of the particular case, without limitations on the degree of restrictions upon speech, and with little or no regard for who was subject

or not subject to the particular rule or order. In contrast to these two factual settings, the "reasonable likelihood of publicity tending to prevent a fair trial" test has been used in criminal cases where the order was requested by one or both parties, where the order restrained only those persons connected with the case and under the jurisdiction of the court, where the order was narrowly and specifically drawn as to the type of comment prohibited, and where there was no attempt to impose a specific or direct prior restraint upon the press.

The present case falls within the latter category. The California Court of Appeal for the Fifth Appellate District held in this case that:

> "The judge need only be satisfied that there is a reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial." (51 Cal.App.3d at 208)

It is important to note that the order in this case in no way purported to be a restraint upon publication by the press and was never treated as such; it was directed only to officers of the court, law enforcement personnel and witnesses in a criminal case, and furthermore, it was consented to by the defense counsel for the criminal defendants and it was unopposed by the District Attorney. The nature of comment restricted by the order was clearly and specifically set forth, and the scope of the restriction was narrowly drawn so as to prohibit only comment that in fact would have created a reasonable likelihood of prejudicial news. (Order is reproduced at 51 Cal.App.3d at 200-201.) The order was issued only after multiple motions by the criminal defendants and after careful consideration by the trial court.

The only other California case to have carefully considered this issue extensively analyzed the relevant federal cases and also concluded that a reasonable likelihood of publicity tending to prevent a fair trial was the appropriate test. (*Younger v. Smith* [1973] 30 Cal.App.3d 138, 158-164, 106 Cal.Rptr. 225, 238-243) The *Younger* court pointed out that protective orders must be geared to the apparent needs of the moment and judged with that necessity in mind, and that they are subject to continuing review based on changed conditions.[4]

Consistent with the California cases is *United States v. Tijerina* (10th Cir. 1969) 412 F.2d 661, where, in a criminal case, the defendant suggested that a protective order be entered restricting extrajudicial comment by the parties. Upon later challenge of the order, the Court of Appeal for the Tenth Circuit upheld the order under a "reasonable likelihood" test (412 F.2d at 666)

The federal cases employing a "clear and imminent danger to the fair administration of justice" test to measure protective orders were concerned with vastly different circumstances than was the court in the present case, in *Younger v. Smith, supra,* or in *United States v. Tijerina, supra.*

In two of the federal Court of Appeal cases cited by the newsmen, the court orders in question were prior restraints made specifically applicable to the news media. In *Dorfman v. Meiszner* (7th Cir. 1970) 430 F.2d 558, a court

4. The other California cases cited by the newsmen are inapposite. In *Hamilton v. Municipal Court* (1969) 270 Cal.App.2d 797, 801-802, 76 Cal.Rptr. 168, 171, the court found the clear and present danger test to be satisfied without addressing the issue as to *which* test was appropriate. In *Sun Co. of San Bernardino v. Superior Court* (1973) 29 Cal.App.3d 815, 829, 105 Cal.Rptr. 873, 883, the protective order purported to be a direct restraint on what the press could published.

rule prohibited news photography and broadcasting in numerous areas of a twenty-seven floor building in which the court was located, including entire floors which contained non-court federal offices, a large public lobby, and an open outdoor plaza. In *United States v. Columbia Broadcasting System, Inc.* (5th Cir. 1974) 497 F.2d 102, a federal distict court attempted to prohibit a television news artist from making and publishing sketches of criminal trial proceedings without regard to whether the sketches were made within or without the courtroom and without regard to the content of the sketches. Without a doubt, the appropriate standard to use in evaluating the validity of these direct prior restraints on the news media was the "clear and present" or "clear and imminent danger" test. There was, however, no such direct prior restraint upon publication in the present case.

Four of the federal cases cited by the newsmen involved court orders which were vague and overbroad and purported to restrict comment by attorneys. Three of these four cases arose out of the seventh circuit. In *Chase v. Robson* (7th Cir. 1970) 435 F.2d 1059, an order was entered that prohibited the attorneys and parties in the case from making virtually *any* public statement, however innocuous, about the case. The order was challenged by a defendant and the court held it was overbroad and constitutionally impermissible under either the "reasonable likelihood" or the "clear and present danger" test. In *In re Oliver* (7th Cir. 1971) 452 F.2d 111, a district court rule contained a blanket prohibition of all extrajudicial comment by counsel in *all* pending cases, criminal and civil, whether tried before the court or a jury and without regard to whether the comment was or even could have been prejudicial to the fair administration of justice; upon challenge by an affected

attorney, the rule was held to be void on its face. In *Chicago Council of Lawyers v. Bauer* (7th Cir. 1975) 522 F.2d 242 attorneys challenged a similar local court rule. Again the seventh circuit held that there could not be a *blanket* prohibition of attorneys' comments without a consideration of whether particular statements posed a serious and imminent threat of interference with a fair trial; this court rule included within its prohibition even innocuous statements. The *Bauer* court was particularly concerned because the rule drew no distinction between civil and criminal trials; it pointed out that restrictions on speech are more justifiable in criminal trials. In the fourth case of this genre, the sixth circuit was faced with an order in a civil trial that swept even broader than did the court rules in the seventh circuit cases. In *CBS, Inc. v. Young* (6th Cir. 1975) 522 F.2d 234, in a civil trial arising out of the Kent State killings, the district court entered an order prohibiting *relatives, close friends, and associates* of the parties to the action from discussing the case *in any manner* with the news media or the public. The appellate court noted that this was a civil trial and held that the overbroad order could not measure up to the "clear and present danger test."[5]

Thus, while the "clear and present danger" test is required in some situations, notably where there is a direct prior restraint upon publication (e.g. *United States v.*

5. The petitioning newsmen assert that the ninth circuit held in *Farr v. Pitchess* (9th Cir. 1975) 522 F.2d 464, 468, that a protective order was valid if the release of information "might interfere with the right of the defendant to a fair trial". Petitioners contend that this language demonstrated that the ninth circuit adheres to a third test for entry of protective orders. There is no merit to this contention. The *Farr* court was not even presented with this issue; it was merely discussing in dicta, in general terms, the obligation upon a trial court to see that the *Sheppard* mandate (*Sheppard v. Maxwell* (1966) 384 U.S. 333) is carried out.

Columbia Broadcasting System, Inc., supra, 522 F.2d 234), and it may be permissible in many situations, it is certainly not the required test in a factual setting as was present in the instant case. In *Sheppard v. Maxwell* (1966) 384 U. S. 333, this court stated that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case", transfer it to another county, or sequester the jury. This court went on to say that trial courts must protect their processes from prejudicial outside interferences by rules and regulations, and that "[n]either prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." (384 U.S. at 363). In *Estes v. Texas* (1965) 381 U. S. 532, 540, this court characterized the preservation of a fair trial as "the most fundamental of all freedoms" and said that it "must be maintained at all costs". The protective order approved of in the present case was in clear compliance with *Sheppard* and *Estes*.

The petitioning newsmen herein also seek to create and benefit from a coattail effect of *Nebraska Press Association v. Hugh Stuart, Judge District Court of Lincoln County, Nebraska*, cert granted, No. 75817 (1975) ..... U. S. ..... As this court is already aware, the *Nebraska* case involves a court order that restrains the press from reporting about testimony and evidence adduced at a preliminary hearing that was open to the public, and restrains the publication of certain other evidence that could become public prior to trial.

The differences between the *Nebraska* case and the present one are obvious and of critical importance. Nothing in the orders of the Fresno County Superior Court purported

to be, or had the effect of being, a direct prior restraint upon publication by the press. No member of the press was restrained by respondent's orders; in fact, the press was free to print whatever it wished to print, and in fact, it did that very thing. The petitioning newsmen were not held in contempt for publishing excerpts of the sealed grand jury transcript. They were held in contempt for refusing to answer questions relevant to the trial court's inquiry into who, if any of those subject to its jurisdiction, violated the court orders. The newsmen's plea has a hollow ring to it—the California Court of Appeal recognized their claim that they did not have to reveal a source who was a person *not* subject to the order (51 Cal.App.3d at 224-225). The newsmen have claimed all along that their source was such a person. If that in fact was the case, the newsmen, in answering approved questions, will risk nothing at all. Their source will be protected.[6]

IV.

THIS COURT SHOULD NOT ISSUE AN ADVISORY OPINION REGARDING A NEWSPERSON'S CONDITIONAL FIRST AMENDMENT PRIVILEGE

It is established beyond question that this court does not render advisory opinions, and as a corollary to that, this court does not review cases that are based upon adequate state grounds (*Herb v. Pitcairn* (1945) 324 U.S. 117, 125-126). These axioms are dispositive of the newsmen's contention that this case is an appropriate vehicle for the review of the scope of the newsperson's privilege to conceal the identity of confidential sources; this is so because the California Court of Appeal's decision was based upon an interpretation of the California shield law (California Evidence Code § 1070) and that interpretation upheld a statu-

6. Respondent does not concede that petitioners have standing at this stage of the proceedings to raise the issue of the validity of the protective order.

tory newsperson's privilege in terms so broad that it necessarily encompasses and goes beyond any conditional First Amendment newsperson's privilege. The state court's decision could have been based as easily upon a First Amendment rationale as upon the state ground.

In response to the newsmen's argument that they were absolutely privileged under California law to refuse to reveal their source, the California Court of Appeal held that the newsmen were required to respond to the court's inquiries "only when the questions asked may tend to identify who, if anyone, *among those subject to a court's order,* may have violated it." (51 Cal.App.3d at 224) Elaborating upon and qualifying this statement, the court said:

> "The shield law still remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court.
>
> The key to the application of the above enunciated test is a determination on a question-by-question basis as to whether or not the answer to a question may tend to endanger the revelation of a protected source. To this end, within the rather narrow constrictions described above and even in the face of denials that court officers were involved, questions may continue to be asked if the answers may reveal that the source of the information was a court officer. Evidence Code section 1070 would not protect a refusal to answer this type of question. However, should a question be overbroad, i.e., it might tend to reveal that either a court official *or* a protected source was involved in the newsperson's obtaining of the information, the privilege under Evidence Code section 1070 would apply. Furthermore, a court is not entitled to ask questions directed toward discovering where the information did *not* come from (other than as they pertain to court officials) in order

> to narrow the field of inquiry vis-a-vis the protected sources. The court is only entitled to ask questions directed toward affirmatively determining if the information did come from court officers or attaches." (51 Cal.App.3d at 224-225)

In an appendix to its opinion (51 Cal.App.3d at 242-247), the Court of Appeal specified question by question which of the trial court's inquiries the newsmen must answer and which they are privileged to decline to answer.

Thus, under the decision of the court below, newspersons in California are absolutely privileged to withhold the identities of their confidential sources save one exceptional circumstance—where the release of information by the source was in direct violation of a protective order entered by a court to preserve and protect a criminal defendant's right to a fair trial. If there is a conditional First Amendment right of newspersons to protect their confidential sources, it most certainly is included within the virtually absolute privilege granted under the California statute and upheld by the California Court of Appeal.

The petitioning newsmen, however, contend that there is not a sufficiently compelling state interest to justify this infringement upon their otherwise absolute statutory privilege or upon a conditional First Amendment privilege to protect confidential sources. They contend that because a change of venue had been granted to two of the three criminal defendants at the time they published their articles quoting from the grand jury transcript, that the criminal defendants were not prejudiced by the publicity, and therefore the trial court had no continuing interest in discovering whether a person subject to its jurisdiction had violated the protective order.

The arrogance of this contention is startling. At the time the articles were published, one of the criminal defendants

was still scheduled to stand trial in Fresno. The Court of Appeal reviewed the contents of the news articles and found the information therein to be highly prejudicial to that defendant and subject to substantial question as to admissibility. Furthermore, petitioners themselves testified that they wrote the articles quoting from the sealed grand jury transcript about one month before they were published; thus, any violation of the court order in leaking the transcript to the newsmen took place well before the other two criminal defendants were granted changes of venue. (51 Cal.App.3d at 209)

Notwithstanding the prejudice to those particular criminal defendants, it seems patently obvious that one state interest in inquiring into the violation of the order was to insure the integrity and credibility of trial courts' protective orders in the present case and in all future cases in which such orders are required. If the power of the trial court to proceed with this inquiry could have been defeated simply by denials of complicity by those subject to the order and a statement by the newsmen that their source was not such a person, there would simply be no point in ever again entering such an order.[7] The mandate of *Sheppard* and *Estes* would be unenforceable and consequently meaningless.

Furthermore, there is no real societal interest in protecting the source in this case if that source is a person subject to the protective order. The societal interest involved is to preserve the constitutional right to a fair trial. If the effect of the decision of the court below is to deter court officers or employees from violating court orders and

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7. Perjury by officers of the court or newsmen in such an inquiry is more than a theoretical possibility—it has occurred fairly recently in California. (See *Farr v. Superior Court* [1971] 22 Cal. App.3d 60, 99 Cal.Rptr. 342)

endangering citizens' right to a fair trial, then the inquiry held in the present case will be well justified.

Petitioners' further assertion, that their news stories were necessary to expose public corruption, is equally without merit. The implication throughout has been that only the unilateral acts of petitioners prevented the information in the grand jury transcript from being lost forever to the public. A point worth noting, however, is that the transcript was to be sealed only until the criminal trials were completed. Furthermore, at the time Stefano and Aluisi obtained changes of venue, nothing would have prevented petitioners from seeking a judicial modification of the protective order. Even though they were not subject to the order sealing the transcript, petitioners would have had standing to challenge it (*Craemer v. Superior Court* [1968] 265 C.A.2d 216, 218, n. 1, 71 Cal.Rptr. 193, 196). Petitioners were aware of the availability of this procedure (Opinion, 51 Cal.App.3d at 209, n. 10). Instead, petitioners took it upon themselves to balance the competing considerations and make public the contents of the sealed transcript.

Considering the broad scope of the privilege granted the newsmen under the California shield law, considering the compelling public interest in investigating violations of protective orders, and considering the non-existence of any real interest in protecting a court officer or employee who violated this protective order, it is clear that there is no First Amendment issue in this case worthy of review.

V.

PETITIONERS RAISE NO FEDERAL CONSTITUTIONAL ISSUE IN THEIR RELIANCE UPON A COMMENT IN A FOOTNOTE IN BRIDGES v. STATE OF CALIFORNIA

Despite its most diligent efforts, the respondent Superior Court fails to discern even a glimmer of a federal constitutional issue in the petitioning newsmen's third argument. The newsmen, misplacing their reliance upon a comment in a footnote[8] in *Bridges v. State of California* (1941), 314 U.S. 252, 261, n. 3, now argue that the Supreme Court of the United States is bound by a state legislative determination, that newsmen are absolutely privileged to protect confidential sources, *even though* that determination has been consistently ruled by the California courts to be in contravention of the California Constitution whenever the exercise of the privilege would interfere with the power of the court to control its own proceedings and officers. The newsmen's convoluted reasoning is, once again, merely an attempt to obtain a United States Supreme Court review of an issue turning solely on state law.

The newsmen state that "the California legislature has . . . made a finding of fact that [the] First Amendment issue predominates over other interests asserted in opposition to it" (Pet. for Cert. p. 18-19). The statement is inaccurate and irrelevant. First, the legislature made no finding of *fact;* it made a value judgment as to the weight

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8. In *Bridges v. State of California* (1941) 314 U.S. 252, 261 n. 3, this court was discussing whether the state legislature had enacted legislation relevant to the issues in the case; in a footnote, the court commented:

> "Indeed, the only evidence we have of the California legislature's appraisal indicates approval of a policy directly contrary to that here followed by the California courts. For Section 1209, subsection 13, of the California Code of Civil Procedure (1937 Ed.) provides: '. . . no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings.' The California Supreme Court's decision that the statute is invalid under the California constitution is an authoritative determination of that point. But the inferences as to the legislature's appraisal of the danger arise from the enactment, and are therefore unchanged by the subsequent judicial treatment of the statute."

to be accorded various rights and privileges. Second, the fact that a state legislature has made certain value judgments, or even factual findings, gives it no license to enact laws in contravention of the state constitution. Third, the finding by two districts of the California Court of Appeal[9] that the California statute *is* in contravention of the state constitution does not present a federal question—it is strictly a matter of state law and the Court of Appeal's decision on this point can be reviewed only by the Supreme Court of California. Regarding this very point, this Court stated in *Branzburg v. Hayes* (1972) 408 U.S. 665, 706:

> It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

Nothing in the *Bridges* opinion supports the newsmen's argument. The holding in *Bridges* overturning judgments of contempt arose out of situations where trial courts attempted to punish (1) a labor union official for including in a telegram to the Secretary of Labor language critical of a judicial decision, and (2) newsmen for publishing editorials concerning judicial rulings. The holding had little if anything to do with a California statute speaking to the contempt power of a court (314 U.S. at 261 n. 3). It was, rather, as pure and simple a free speech case as there ever was. In the present case, however, no one was held in contempt for exercising their rights to speak and write freely. The petitioning newsmen were held in contempt for refusing to answer relevant questions in an investigation into an apparent violation by a court officer of a lawful court order.

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9. *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 210-212; *Farr v. Superior Court* (1971) 22 Cal.App.3d 60, 69-70, 99 Cal.Rptr. 342, 347-348.

There being no federal question in the newsmen's third argument, review by this court would be inappropriate.

VI

THERE HAS BEEN NO VIOLATION OF THE NEWSMEN'S RIGHT TO DUE PROCESS

The newsmen contend that they were denied due process in the course of the trial court's inquiry into the apparent violation by a court officer of the protective order in that, when they were called as witnesses, they were not allowed to cross examine or to call other witnesses. They also assert that the inquiry abridged in some unspecified way their Fifth, Sixth and Fourteenth Amendment rights.

The facts do not bear out the newsmen's allegations. The newsmen were simply several of many witnesses in a judicial hearing, the sole purpose of which was to determine if any persons subject to a court order had violated that order. The newsmen were not defendants—they were accused of nothing—in fact, they were themselves not even subject to the order. The newsmen had notice of the nature and time of the proceedings. (Opinion, 51 Cal.App.3d at 229) Their counsel were present throughout the hearings and were allowed to submit additional questions to the other various witnesses through the Assistant County Counsel. (Opinion, 51 Cal.App.3d at 202) When the newsmen were called as witnesses, they were each informed of the identity of the prior witnesses and the contents of the prior testimony. While on the stand, the newsmen consulted frequently with counsel. (Opinion, 51 Cal.App.3d at 203) The questions sanctioned by the Court of Appeal that the newsmen refused to answer were framed only to determine if the source of the sealed grand jury transcript was a person subject to the court's protective order. (Opinion, 51 Cal.App.3d at 242-247) When newsman Rosato claimed that his answer to a question might tend to

incriminate him, he was immediately granted immunity from prosecution (RT of Hearing, January 24, 1975, p. 123-124, 127). The newsmen were given notice of the charges of contempt and an opportunity to be heard prior to the imposition of the sentences for contempts and they were given an opportunity to purge the contempts before sentences were passed. (Opinion, 51 Cal.App.3d at 229) Finally, the sentences imposed were coercive rather than punitive. (Opinion, 51 Cal.App.3d at 229-230)

Thus, it is clear that the newsmen were accorded many more rights and privileges in the course of the hearings than was required by the due process clause; in fact, the trial court was quite solicitous of their rights as witnesses. What the newsmen's real complaint boils down to is not that they were denied due process; it is that they were required to submit themselves to the processes of the law. While they may have found themselves in an uncomfortable situation, that situation was entirely of their own making. Even now, to avoid being sentenced for contempt, the newsmen need only return to court and answer those questions, permissible under the Court of Appeal's decision, that are framed to determine if a person subject to the court order violated that order.

VII.

CONCLUSION

The granting of certiorari in this case is unnecessary and would be inappropriate because (1) there is no substantive conflict in the cases regarding the standard for the entry of protective orders re publicity and there is little if any similarity between the facts and applicable principles of law in this case and those in *Nebraska Press Association v. Hugh Stuart, etc., supra*; (2) there is no need for an advisory opinion regarding a newsperson's conditional

First Amendment privilege; (3) the fact that California courts felt themselves free to interpret a California statute in light of the California constitution does not present a federal question; and (4) the respondent Court accorded the petitioning newsmen full due process of law when they appeared as witnesses before the court.

Dated: February 9, 1976

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-919

JOE ROSATO, *et al.*, *Petitioners*,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO, *Respondent*.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42(1) of the Rules of this Court, permission is sought for the filing of the annexed brief amicus curiae prior to consideration of the petition for writ of certiorari on behalf of the following parties: McClatchy Newspapers, The Reporters Committee for Freedom of the Press, The National Press Club, The Newspaper Guild, Mellett Fund For a Free and Responsible Press, California Freedom of Information Committee, Fresno Free College Foundation, Sigma Delta Chi, California Newspaper Publishers Association, the California Broadcasters Association, the National Association of Broadcasters and the National

Newspaper Association. Each of these organizations, as is more fully described in an Appendix to the attached brief, is intimately involved in the collection and dissemination of news and thus has a vital interest in the outcome of this case, where two reporters and two editors have been held in contempt for their refusal to disclose a confidential news source.

Permission for leave to file this brief was sought from the parties. However, counsel for respondent, The Superior Court, refused to grant permission, making necessary the filing of this motion.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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---

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI

This brief amicus curiae is filed in support of the Petition for Writ of Certiorari on behalf of the following parties as amici curiae: McClatchy Newspapers, The Reporters Committee for Freedom of the Press, The National Press Club, The Newspaper Guild, Mellett Fund for a Free and Responsible Press, California Freedom of Information Committee, Fresno Free College Foundation, Sigma Delta Chi, California Newspaper Publishers Association, California Broadcasters Association, the National Association of Broadcasters and the National Newspaper Association. In an Appendix to this brief there is set forth a descrip-

tion of each of the amici stating, as to each, the nature of its business, what its interest is in this proceeding, and any special relationship which it has to this case.

This Court will note that the amici represent the entire spectrum of the American news media including major organizations composed of publishers, editors, reporters, and broadcasters. These amici desire to be heard for a most compelling reason.

The decision below rests upon the proposition that the courts may convert the press into investigative arms of the Judiciary any time a reporter is believed to have any information about what appears to be a violation of a "gag order" or any type of judicial injunction. The amici believe that the press has an independence, founded in the Constitution, which precludes each branch of the government—be it Judicial, Legislative or Executive—from eroding the integrity of the press by forcing news reporters to become official investigative agents of government unless the government can show "a present danger" to a "subject of overriding and compelling state interest." Here, there is no such vital state interest. Indeed, the decision below is directly contrary to the state interest in a free and untrammeled press expressed by the state legislature in enacting a newsman's shield law.

STATEMENT OF THE CASE

This case arises out of a matter quite properly the subject of intense public interest in the Fresno, California community—the bribery indictment in the fall of 1974 of Messrs. Stefano, a city councilman, Aluisi, a prominent developer, and Bains, a former city planning commissioner. Shortly after the indictment was issued, the defendants moved for an order sealing the

grand jury transcript. The motion was consented to by the prosecution and was granted by the judge hearing the case on November 21, 1974. The next day, with the agreement of all defendants, the judge entered a sweeping "gag order" barring extrajudicial statements by, *inter alia,* the parties, their attorneys, and court officials.[1] There is no indication in either of the orders or in the transcript of the brief hearing held on November 21, 1974 that the court considered the effect these orders would have on the public's right to be informed on matters of local government or on the First Amendment rights of the press. Nor is there any indication that the court was asked to consider, or did consider, alternative methods of insuring that the defendants would receive a fair trial, such as a searching *voir dire* or a change of venue.[2]

Despite the sealing of the grand jury transcript and the entry of the "gag order," defendants Stefano and Aluisi moved for a change of venue. The Stefano motion was granted on January 3, 1975. On January 7, 1975, the court indicated it would grant the Aluisi motion. The cases were transferred to Oakland and Monterey respectively. Defendant Bains did not file a change of venue motion.[3]

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[1] The briefest examination of this "gag order" shows that it is a "boiler plate" form borrowed from cases involving violent crimes. For example, the authorities were not barred from informing the public as to the danger presented by suspects not in custody.

[2] Recent decisions suggest that a careful *voir dire* will be sufficient to protect a defendant's rights even in the most notorious of cases. *See Murphy* v. *Florida*, 421 U.S. 794 (1975); *Calley* v. *Callaway*, 519 F.2d 184, 205-210 (5th Cir. 1975) (en banc).

[3] Defendant Stefano was subsequently acquitted; Aluisi was convicted; and the charges against Bains were dropped after he testified against the other two.

On January 12, 13 and 14, 1975, after the Stefano and Aluisi change of venue motions were acted on, The Fresno Bee published stories under the byline of Petitioners Rosato and Patterson which purported to disclose testimony before the grand jury that had indicted Messrs. Stefano, Aluisi and Bains. The stories related to a possible conflict of interest of city councilman Stefano on a matter which might shortly go before the City Council. Petitioners Gruner and Bort, the Managing Editor and City Editor of the Bee, subsequently testified, without rebuttal, that the articles contained nothing about Bains, the only defendant whose case had not been transferred to a venue other than Fresno, which had not previously been reported.

Subpoenas were issued to the four Petitioners requiring their appearance at hearings on whether or not a violation of the court orders had taken place. However, prior to calling any of the Petitioners, the Court first heard the testimony of 13 witnesses who had lawful access to the grand jury transcript. Each witness denied that he had furnished Petitioners a copy of the transcript. However, as the Court below noted, "it developed that there were several persons who had either access to the grand jury transcript . . . or who had copied the transcript . . . which persons were not called as witnesses." 124 Cal. Rptr. at 435.

Petitioners were then called and questioned as to the source of the stories. Each Petitioner testified that no person subject to the court order was the source of the story but refused to answer additional questions which might reveal the source, claiming a privilege under Section 1070 of the California Evidence Code ("the newsman's shield law") and the First Amend-

ment to the United States Constitution. The trial court found Petitioners in contempt, holding the newsman's shield law inapplicable to contempt proceedings and rejecting the First Amendment claim. Each of the Petitioners was sentenced to an indefinite term of confinement until he would respond to the questions posed.

On writ of review, the California Court of Appeal of the Fifth Appellate District affirmed most of the contempt citations, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975). The California Supreme Court refused to review that decision, and Petitioners have timely sought review in this Court by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is in Conflict With This Court's Decision in *Branzburg* v. *Hayes*

In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this Court explicitly recognized that news gathering is protected by the First Amendment and that "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681. Nonetheless, the Court refused to accord newsmen a constitutional privilege to protect the anonymity of news sources in the face of a good faith request by a properly constituted grand jury, holding that such a request for relevant information known to reporters supplied the required convincing showing of "a substantial relation between the information sought and a subject of overriding and compelling state interest." 408 U.S. at 700, quoting *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963).

This result rested in part on the historic role of the grand jury, the absence of any showing that the grand jury had abused its proper function, the fact that grand jury secrecy would limit the disclosure of the identity of the news source, and the fact that a contrary holding would require repeated interruption of grand jury proceedings. The Court was careful to state that "Nothing in the record indicates that these grand juries were 'prob[ing] at will and without relation to existing need,' " 408 U.S. at 700, and that "news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." *Id.* at 707.

Mr. Justice Powell's separate concurring opinion expanded on this point, stating that the First Amendment shields a newsman from disclosing the identity of a confidential source when his testimony bears "only a remote and tenuous relationship to the subject of the investigation" or would not serve "a legitimate need of law enforcement." 408 U.S. at 710. Such a claim of privilege is to "be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id.*

The great weight of lower court decisions since *Branzburg* have interpreted that case as establishing a qualified privilege for journalists where the demand for disclosure of a news source is made other than in the grand jury context. *See generally,* Goodale, *Branzburg* v. *Hayes and the Developing Qualified Privilege for Newsmen,* 26 Hastings L.J. 709 (1975). This view of *Branzburg* is seen, for example, in the two most recent federal court decisions to discuss the issue. In *Loadholtz* v. *Fields,* 389 F. Supp. 1299, 1301-02 (M.D. Fla. 1975), the court concluded that the forced disclosure of news sources should not be extended "beyond the limited confines of the criminal justice system" to a libel suit, particularly when there was no showing "that the information sought could not be gleaned from other sources." Similarly disclosure of a news source was not required in a civil case where the evidence sought "is relevant, but not essential to the resolution of the judicial controversy" and where alternative sources of information are available. *Apicella* v. *McNeil Laboratories, Inc.,* 66 F.R.D. 78, 82, 85 (E.D.N.Y. 1975).

Many other cases are to the same effect. For example, in *Cervantes* v. *Time, Inc.,* 464 F.2d 986, 992-3 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), a libel case was dismissed on summary judgment despite the fact that the author of the allegedly libelous article had refused to reveal his confidential sources. The court stated:

> We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources. But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws.

The court held that to force disclosure of a confidential news source without some reason to doubt the defendant's assertion that the source was reliable would constitute harassment of the sort condemned by this Court in *Branzburg*. 464 F.2d at 995, n.12.

Similarly, in *Baker* v. *F & F Investment*, 470 F.2d 778 (1972), *cert. denied*, 411 U.S. 966 (1973), the Second Circuit refused to force a reporter to disclose the confidential source of information in a magazine article although the source apparently had information relevant to the pending litigation. The court held, 470 F.2d at 782, that:

> Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis—and the district court so found. The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting, the dividends of which are revealed in articles such as Balk's, threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.

In *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394 (D.D.C. 1973), a qualified First Amendment privilege against the disclosure of news sources was recognized because of the public interest in continued vigorous press coverage of an issue of vital public concern, Watergate. The defendants in the civil suit arising from the Watergate break-in had sought to force newsmen covering Watergate to disclose their sources. The court blocked this attempt, noting that it could not "blind itself to the possible 'chilling effect'

the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public." *Id.* at 1397.

In *State* v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974), a journalist was asked who had informed him of the police raid which led to the criminal trial then being conducted. He refused to disclose his source, and the Vermont Supreme Court upheld his First Amendment privilege to so refuse absent the presence of other compelling interests:

> [W]e hold that, when a newsgatherer, legitimately entitled to First Amendment protection, objects to inquiries put to him in a deposition proceeding in a criminal case, on the grounds of a First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate . . . that there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence." *Id.* at 256.

Brown v. *Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974), applied the same test in upholding a reporter's refusal to disclose a source in another criminal trial. *See also People* v. *Marahan*, 81 Misc.2d 637, 368 N.Y.S.2d 685, 692 (1975) ("The information sought would not be of sufficient probative value or relevancy to warrant compelling the testimony sought here."); *Commonwealth* v. *Vitello*, 327 N.E.2d 819, 829 (Mass. 1975).[4]

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[4] A similar approach may be found in pre-*Branzburg* cases as well. *See Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971); *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970) and 315 F. Supp. 681 (D. Md. 1970).

In these cases, the lower courts properly interpreted *Branzburg* as holding that, where the subpoena does not emanate from a grand jury, a court should not force a journalist to disclose the source of a news story without first balancing a variety of relevant factors, including the chilling effect disclosure will have on future news stories; the existence of alternate sources for the information; the relevance of the inquiry; and the public interest served by disclosure.

An application of the balancing approach required in the non-grand jury context to the facts of this case requires a reversal of these contempt citations. On one side of the scale, it is clear that requiring disclosure of news sources would chill future stories on matters of intense local concern such as Councilman Stefano's apparent conflict of interest. The gravity of this harm to the First Amendment rights of the California press occasioned by forced disclosure of news sources has been recognized by the California Legislature in the enactment of a newsman's shield law, California Evidence Code § 1070. For a fuller discussion of the weight which must be accorded this legislative finding of fact, see pp. 15-20 *infra*.

There is no countervailing state interest which justifies such a limitation of press freedom. The proceedings in question were originally claimed to serve three purposes: (1) to make a record on potential prejudicial publicity in the trials of the defendants; (2) to vindicate an apparent violation of the court's gag order; and (3) to explore an apparent violation of the sealing order. Only the third point has a shadow of substance. No risk to a fair trial had been occasioned as to defendants Stefano and Aluisi, whose

cases had been transferred to another venue prior to both the hearings and the publication of the news stories. Nor did the contempt proceedings further the cause of justice as to defendant Bains, who remained to be tried in Fresno. The articles contained nothing about Bains that had not previously been in the public domain; and, if prejudice could arise from repetition, more prejudice flowed from the contempt hearings than from the original articles themselves. In fact, the charges against Bains were dropped after he testified against the other defendants.[5] *Cf. Commonwealth* v. *Vitello,* 327 N.E.2d 819, 829 (Mass. 1975) (no error in refusing to allow a defendant to question a newsman about the source of an allegedly prejudicial news story when a fair and impartial jury was nonetheless selected).

Nor was a substantial state interest presented by the alleged need to inquire into a violation of the gag order. That order was invalid *on its face* because it limited substantial First Amendment rights on no more basis than a finding that additional publicity "*may* interfere" with a fair trial. (Emphasis supplied). Indeed, the very decision below held that the proper standard for the issuance of a gag order is whether "there is *a reasonable likelihood of prejudicial news* which *would* make difficult the impaneling of an impartial jury," 124 Cal. Rptr. at 438-39 (emphasis supplied) citing *Younger* v. *Smith,* 30 Cal. App.3d 138, 106 Cal. Rptr. 225 (1973) and *United*

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[5] In apparent recognition of the lack of relevance of Petitioner's testimony to the issue of prejudicial publicity, the trial judge asserted in his formal Findings and Order Adjudging Contempts of Petitioner Bort ¶ 18 only that the questioning was relevant to a possible violation of a court order.

States v. *Tijerina*, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969). The California courts have specifically held it improper to limit free speech, as was done here, on the "possibility" that some evil might occur. *Sun Co.* v. *Superior Court*, 29 Cal. App. 3d 815, 829-30, 105 Cal. Rptr. 873, 884 (1973). Hence, even under the standard accepted in California,[6] the gag order was invalid, and proceedings to determine whether an invalid order was violated obviously cannot provide the "overriding and compelling state interest" necessary to justify the chilling inquiry as to news sources.[7]

This leaves as the only valid state interest conceivably served by the inquiry into the Petitioners' sources the possibility that a person subject to the order sealing the grand jury transcript had violated that order. Under the circumstances of this case, the court's valid interest in vindicating its sealing order cannot justify the burden imposed on freedom of the press. First, all witnesses, including Petitioners, testified that no one subject to the sealing order was the source of the news story. With not one scintilla of evidence to the

[6] The proper standard for the entry of a gag order is, of course, a federal question, and other courts have imposed substantially stricter requirements than those followed in California. *See, e.g., CBS, Inc.* v. *Young*, 522 F.2d 234, 240 (6th Cir. 1975) ("clear and imminent danger" test). This Court recently granted certiorari to consider that issue in *Nebraska Press Association* v. *Stuart*, No. 75-817, and it would be appropriate to grant certiorari here on that issue as well.

[7] This is particularly the case because, under California law, the validity of a court order may be tested by disobeying it and challenging its validity in a contempt proceeding. *Younger* v. *Smith*, 30 Cal. App.3d 138, 151-52, 106 Cal. Rptr. 225, 233-34 (1973); *In re Berry*, 68 Cal.2d 137, 65 Cal. Rptr. 273, 281-82, 436 P.2d 273, 281-82 (1968).

contrary, this should have been the end of the inquiry.[8] And even if there were merit to the suggestion of the court below that the trial court was entitled to disbelieve the testimony (124 Cal. Rptr. at 449), it is clear that the unanimity of the witnesses on this point renders the information sought from Petitioners of far less relevance than would otherwise be the case.

Perhaps recognizing the weakness of this position, the court below suggested further that questions probing possible sources must be answered even if the response would only show carelessness on the part of a person subject to the sealing order in allowing the transcript to fall into Petitioners' hands. 124 Cal. Rptr. at 451. Assuming the validity of this novel doctrine of "contumacious negligence," the state interest in fereting out a negligent attorney is far less compelling than that in punishing a willful violation of a court order. Such an attenuated interest does not remotely approach that of a grand jury pursuing evidence of a crime, and cannot, consistent with *Branzburg* and its progeny, be allowed to outweigh First Amendment rights, particularly when other lines of inquiry remained to be explored. *Apicella, supra*, 66 F.R.D. at 85; *State* v. *St. Peter, supra*.

Significantly, there is no evidence in the record that the trial judge balanced these factors at all. Rather he expressly proceeded on an assumption that *no First Amendment issues were implicated in this*

[8] The County Counsel, who acted as "prosecutor" in the trial court, appeared to proceed on the assumption that no violation of the court order had taken place, but that Petitioners had "taken" the transcript without the knowledge of any person subject to the order. This, of course, was a matter for a grand jury, not a contempt proceeding.

case at all.[9] And, even if the trial judge had attempted to balance dispassio nately the competing interests involved, the record strongly suggests that he lacked the necessary detachment. For in the course of the proceedings below, the judge held a televised press conference during which he labeled press criticism of his conduct of the hearings "a biased presentation"[10] and subsequently denounced the press for putting "pressure" on him "individually."[11]

The court below could point to no evidence of a balancing of interests by the trial court but nonetheless assumed that such a process had taken place "impliedly" or "by necessity." 124 Cal. Rptr. at 443. The court below then indicated agreement with the assumed balancing of the trial court by an improper application to this case of the standards announced in *Branzburg* for the grand jury context, *Id.* at 443-4. Society's interest in a grand jury investigation of criminal conduct was unthinkably equated to the interest in searching for possible negligence among custodians of a transcript; no inquiry was deemed necessary through other sources of information; and a loose showing of relevance was tolerated.

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[9] Early in the proceedings, the trial judge stated "In some instances there appears to be a conflict [between freedom of the press and the defendant's right to a fair trial], a whittling away of one at the expense of the other. *Such here is not the case.*" (Transcript of hearing of February 6, 1975 at 15) (emphasis added).

[10] See Transcript of hearing of February 6, 1975 at 14.

[11] Transcript of hearing of April 23, 1975 at 43. Under similar circumstances, this Court has required the recusal of a judge. *See, e.g., Johnson* v. *Mississippi*, 403 U.S. 212, 215-216 (1971); *Peters* v. *Kif*, 407 U.S. 493, 503 (1972); *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 464 (1971).

The facts of this case, then, present a situation where at best newsmen were asked to disclose sources without a "compelling state interest" being thereby served. *Branzburg, supra,* 408 U.S. at 700. At worst, the case presents a probing for sources "at will and without relation to existing need." *Id.*

II. The Decision Below Is Inconsistent With This Court's Decision in *Bridges* v. *California*

The court below erred in failing to give any weight whatsoever in its evaluation of Petitioners' claim of a First Amendment privilege to the factual findings made by the California Legislature in enacting the Newsman's Shield Law, Evidence Code §1070. We submit that under this Court's decisions in *Bridges* v. *California,* 314 U.S. 252, 261 n.3 (1941) and *Wood* v. *Georgia,* 370 U.S. 375, 385-86 (1962), the findings of fact made by the California Legislature in passing the Newsman's Shield Law are conclusive on the California courts and this Court in evaluating First Amendment issues as to the disclosure of news sources.

This Court's decision in *Branzburg* rests heavily on its reluctance to erect a fixed constitutional rule on the basis of judicial fact-finding in an area conceived as more properly left to legislation. The Court stated that, despite an extensive record on the benefits and burdens which would flow from forced disclosure of news sources, it remained "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." 408 U.S. at 693.

Given the uncertainty as to the actual facts and the possibility that the balance would vary from time to time and place to place, this Court viewed the fac-

tual arguments presented to it as "treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere." 408 U.S. at 699. Thus, the Court left the issue open for resolution by the fact-finding powers of the Congress and of state legislatures, 408 U.S. at 706:

> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.

This Court's reluctance to base a constitutional ruling on the resolution of a narrow factual question and its willingness to defer to narrow and careful legislative determinations of fact, even in the First Amendment context, is a matter of familiar law.[12]

[12] *See, e.g., Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94, 96, 97 (1961) ("It is not for the courts to re-examine the validity of . . . legislative findings and reject them."); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (upholding a narrowly and specifically drafted ordinance prohibiting "loud and raucous" soundtrucks); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-08 (1940) (reversing a speech-related conviction on disorderly conduct charges but suggesting that the same conduct could constitutionally be prohibited by a statute "exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil . . . ."); *Cox* v. *Louisiana*, 379 U.S. 559, 561-62 (1965) (narrowly drawn statute "prohibiting picketing near a Courthouse is constitutional); *See generally*, Cox, *The Role of Congress in Constitutional Determinations*, 40 Cinc. L. Rev. 199 (1971).

The California legislature has made such a narrow and careful determination of fact on the crucial issue of "how often and to what extent informers are actually deterred from furnishing information when [California] newsmen are forced to testify . . ." and it has expressed its finding in the form of a sweeping newsman's shield law, California Evidence Code, § 1070, which provides, in pertinent part, that newsmen:

> cannot be adjudged in contempt by a judicial . . . body . . . for refusing to disclose . . . the source of any information procured . . . for publication . . . .

While the court below failed to perceive the relationship of the legislative findings underlying the shield law to Petitioners' First Amendment claims, it was aware that "the Legislature in enacting Evidence Code section 1070 recognized the importance of maintaining a free flow of information and intended that the statute be given a broad rather than a narrow construction."[13] 124 Cal. Rptr. at 445. Nonetheless, the court held § 1070 *pro tanto* unconstitutional to the extent it would interfere with the power of a court to control its own officers, relying on a separation of powers principle inherent in the California Constitution.[14]

[13] The California Legislature has rejected attempts to weaken this provision, and has repeatedly strengthened it, most recently, by an amendment effective in January 1975 extending the statute's coverage to unpublished information, including notes, outtakes, photographs, tapes and other data.

[14] The court below relied upon *Farr* v. *Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342, *cert. denied*, 409 U.S. 1011 (1972)

Significantly, the court's basis for finding the newsman's shield law unconstitutional as applied to Petitioners left untouched the legislature's factual finding that the threat to freedom of speech in California is so grave that forced disclosure of news sources cannot be allowed, even if some crimes will thus go unpunished.

These factual findings of the California Legislature which underlie the newsman's shield law come to this Court in a context indistinguishable from that presented in *Bridges* v. *California,* 314 U.S. 252 (1941), and, as in *Bridges,* control the factual determination upon which an evaluation of First Amendment principles must be based. In *Bridges,* this Court was faced with the action of a California court holding a newspaper publisher in contempt for an editorial written about a pending proceeding, in the face of a state law limiting contempts to statements "made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." The California Supreme Court, citing the same decision relied upon for the *pro tanto* invalidation of the newsman's shield law by the court below, had struck down that provision as violative of the separation of powers doctrine of the California Constitution.

Although the statute itself could not shield the petitioners in *Bridges* from a contempt citation, the legislative findings as to the dangers inherent in such conduct were relied upon by this Court in holding the contempt citations unconstitutional as an infringement

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and *In re San Francisco Chronicle,* 1 Cal.2d 630, 36 P.2d 369, 370 (1934).

on First Amendment rights. The Court stated, 314 U.S. at 261 n. 3:

> The California Supreme Court's decision that the statute is invalid under the California Constitution is an authoritative determination of that point. *But the inferences as to the legislature's appraisal of the danger arise from the enactment, and are therefore unchanged by the subsequent judicial treatment of the statute.* (Emphasis supplied).

See also Wood v. *Georgia, supra,* 370 U.S. at 385-86.

Here, as well, the inferences as to the legislature's appraisal that the danger to freedom of the press in California from forced disclosure of news sources far outweighs the incidental burdens on the enforcement of the criminal law created by a newsman's privilege are unchanged by the shield law's subsequent judicial treatment. This legislative fact-finding is controlling on courts in evaluating the interests involved in Petitioners' claim of a First Amendment privilege under the conditions now prevailing in California. The failure of the court below to recognize the weight to be accorded the legislative judgment led it to engage in its own balancing, to discriminate between the value of enforcing different laws,[15] and to reject erroneously the constitutional privilege claimed by Petitioners.

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[15] By failing to honor the legislative fact finding expressed in the shield law and by exalting a court's interest in vindicating obedience to its orders above the interest of society in the enforcement of the criminal laws, the court below was engaged in making precisely the sort of legislative value judgments which this Court condemned in *Branzburg,* 408 U.S. at 705-06:

> . . . by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. *By requiring testimony*

The decision below thus obstructs precisely the sort of state legislative action dealing with the First Amendment rights of newsmen contemplated by this Court in *Branzburg* and leaves what the California legislature has found to be a violation of federal constitutional rights without a remedy. This Court has both the power and the obligation to protect federal rights and should do so here.

CONCLUSION

For the reasons set out above, the decision below is inconsistent with prior decisions of this Court. Given the sensitive nature of First Amendment rights and the widespread public interest in this case, allowing the judgment below to stand will both cause injustice to the Petitioners and chill the rights of others

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from a reporter in investigations involving some crimes but not in others, they would make a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. *The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.* (Emphasis supplied).

similarly situated. A writ of certiorari should issue so that, upon full review, the decision below may be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

McClatchy Newspapers is the publisher of three newspapers in California, including The Fresno Bee, and operates eight radio and television stations in that state and one radio station in Reno, Nevada. It has received numerous awards and commendations for outstanding journalism, particularly in its coverage of local affairs. It is committed to excellence in seeking out and reporting news and thus has a strong interest in the rights of California newsmen to obtain stories on a confidential basis. McClatchy Newspapers has a particular interest in this case because the news articles which underlie the contempt citations appeared in The Fresno Bee, which is published by McClatchy Newspapers. Each of the Petitioners is an employee of The Fresno Bee, and their imprisonment would severely handicap that newspaper both in its day-to-day operations and in its coverage of local affairs through the use of confidential sources.

The Reporters Committee for Freedom of the Press was formed in Washington, D.C., in March 1970. It consists of members of the working press employed by newspapers, television and radio stations, and other media of communications. Over 100 of its members reside and work in California. The Committee is exclusively devoted to protecting the First Amendment interests of the working press and the freedom of the American people to receive news and information. It provides legal research, advice, representation, and funding to individual reporters and seeks to express the viewpoint of the working press on First Amendment questions. The Committee has filed amicus briefs in a number of cases, including several in the state and federal courts of California. Members of the Committee have appeared before Congressional Committees and have participated in the drafting of legislation, such as Evidence Code Section 1070, designed to protect newsmen. The Committee serves as a clearinghouse and source of information to the

press and the public about developments relating to the freedom of the press.

The National Press Club is a broadly-based national journalistic organization headquartered in Washington, D.C. It has 2,900 active journalists as members located in 49 states many of whom represent California news gathering organizations or are residents of California. The National Press Club is in close contact with other associations of journalists, sponsors educational programs for journalists, and takes stands on important issues affecting the practice of journalism. It is vitally important to each of the nearly 3,000 active-journalist members of The National Press Club that journalists retain their rights to seek information on a confidential basis, that the First Amendment rights of journalists not be abridged, and that statutes designed to recognize the rights of journalists be honored.

The Newspaper Guild is a labor union representing some 40,000 employees of newspapers, news services, magazines and related media in the United States, Canada and Puerto Rico, approximately half of whom are news and editorial department employees who have an active and continuing interest in asserting and maintaining the protection of news sources against forced disclosure and in assuring the maximum possible freedom of the press under the First Amendment. As long ago as 1934, at its first annual convention, the Guild approved a code of ethics declaring in part that journalists should refuse to disclose their sources of information "in court or before other judicial or investigating bodies"; the Guild's mandatory collective bargaining program requires that all Guild locals seeks to negotiate contractual protection against disclosure (and a number of locals have done so); and the Guild, and its locals, have worked and continue to work at both the federal and state level for the enactment of testimonial privilege for the press. Of the Guild's 85 local unions, seven are located in the state of California. The Guild has contracts with leading California newspapers, including those in San Francisco, Oakland, San Jose, Stockton, Long Beach, Bakersfield, San Diego and Sacramento. The Guild has had a contract with McClatchy's Sacramento Bee since 1945 and currently is in bargaining for the initial contracts with McClatchy's Modesto Bee and Fresno Bee, at both of which the Guild won National Labor Relations Board representation elections last year. Both are units of the Sacramento Guild Local. The Guild has some 4,000 members in the state of California, including Petitioners Rosato and Patterson.

Mellett Fund For A Free and Responsible Press is a non-profit foundation based in Washington, D.C. It was created in 1966 under a bequest from the late Lowell Mellett, former editor of the Washington Daily News, nationally syndicated columnist and advisor in World War II to the President of the United States. His bequest stated that the Fund should protect freedom of the press while working to establish "a relationship between the people and the press whereby full responsibility for its behavior would be met by the press." Its board of directors is made up of national journalists and journalistic scholars. In its activity to promote greater sensitivity to community needs by the press by retaining complete editorial freedom, the Fund financed voluntary press councils in six American cities from 1967 to 1969. In 1972 the Fund joined a consortium of national organizations under the egis of the American Civil Liberties Union to protect the news process from legal harassment. In 1973 the Fund was one of the cooperating foundations that created the National News Council, a voluntary panel that hears complaints against press performance and issues reports. The Mellett Fund enters this case as a friend of the court in its dedication to responsible journalism and its equal dedication to First Amendment protection of the right to uninhibited publication.

California Freedom of Information Committee is a nonprofit corporation established to work in the field of newsmen's right to access to information, open meetings and protection of confidential news sources under the California Shield law. The Committee, therefore, has a vital interest in the case at hand since it involves one of the Committee's basic responsibilities, protection of confidential news sources. The Committee is sponsored by professional chapters of the Society of Professional Journalists, Sigma Delta Chi; by California Newspaper Publishers; by Radio and Television News Broadcasters; by the Press Club; by Journalism Education; and by others.

Fresno Free College Foundation was formed in Fresno, California, in October 1968. It is a nonprofit corporation under Section 501(c)(3) of the Internal Revenue Code. The Foundation is supported by faculty members of California State University, Fresno, and by individuals in the community. It has approximately 100 active members. Its Articles of Incorporation commit the Foundation to the intellectual and cultural development of the Fresno community. It has sponsored lectures; underwritten timely publications, films and radio programs related to educational and academic personnel issues at the University; provided financial assistance to students; and undertaken financial and legal support for professors and students whose constitutional rights appeared to be violated by University authorities. In 1972 the Foundation filed an amicus brief on behalf of five foreign students who were seeking to enjoin the California State University and Colleges system from increasing fees to such students. In 1971 it gave financial and legal support to a Fresno County Planning Commissioner who had been discharged because of his exercise of First Amendment rights. It is presently constructing a listener-supported noncommercial radio station to serve the Fresno area. The Foundation asserts an interest in this case by virtue of its support of the need for

free and untrammeled news-gathering protected by the First Amendment.

Sigma Delta Chi: The Society of Professional Journalists, Sigma Delta Chi, is the oldest and largest journalistic organization in the nation. It represents more than 29,000 members in 260 campus and professional chapters in the print and broadcast media of whom more than two-thirds are working professional newspersons. It is the only national organization representing all elements in journalism and has 23 chapters in California with more than 1700 members.

It has long been in the forefront of attempts to obtain shield law protection for newspersons at both the state and federal level and to guard against erosion of First Amendment guarantees for the press. It believes that the confidential informant is one of the most important tools a journalist has in bringing to the public information about government. It further believes that, if sources are unprotected, the flow of information to the public about government will be severely restricted and the public will, in the end, be forced to rely for the most part on self-serving government statements about government operations.

California Newspaper Publishers Association is a nonprofit corporation organized under the laws of the State of California and having its principal place of business in the County of Los Angeles. It is composed of several classes of members, and the members include the publishers of 398 daily and weekly newspapers published in the state. It has as its purpose the promotion and advancement of newspaper publication in the state. Since its inception, the Association has been particularly concerned with the protection of freedom of the press under the First Amendment. The Association appears herein on behalf of itself and of its members.

The California Broadcasters Association is a state-wide, non-profit California corporation composed of 130 Cali-

fornia radio (both AM and FM) stations and television stations. The California Broadcasters Association has participated in rule-making and decisional proceedings before the Federal Communications Commission and other Federal, state and municipal regulatory agencies; it has likewise appeared and represented the California broadcast industry before the courts.

The National Association of Broadcasters (NAB) is a non-profit organization of radio and television broadcasters whose membership includes over 4,000 AM and FM radio stations, 540 television stations and all nationwide commercial broadcast networks. Approximately 250 of these radio and television stations are in California. The objective of the NAB, in accordance with its by-laws:

> . . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

In keeping with these objectives, the NAB herein seeks to protect its members, including their employees, from the profound "chilling effect" of the decision reached by the court below. The NAB believes that a primary purpose of the radio and television media is the fair and timely gathering and presentation of news. Thus it is in the interest of all broadcasters that the freedom of the press continue to be unencumbered by undue and unlawful restraint and that broadcasters' First Amendment rights not be abridged.

The National Newspaper Association is a national trade association whose members include more than 5,000 weekly and smaller-city daily newspapers published throughout

the United States, over 280 of which are located in California. NNA strives to promote the best interests and improve the methods and standards of America's community newspapers. In these efforts, the Association works closely with affiliated state and regional associations and with other national newspaper groups and associations. It has filed briefs *amicus curiae* in legal proceedings affecting the press and has represented its members in testimony before Congress and administrative agencies.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-9191

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v.

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Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the Fifth Appellate District

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS FOR LEAVE TO FILE JOINT BRIEF AMICUS CURIAE AND JOINT BRIEF AMICUS CURIAE

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS FOR LEAVE TO FILE JOINT BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") respectfully move this Court for leave to file the accompanying Joint Brief Amicus Curiae in support of the Peti-

tion for Writ of Certiorari filed herein. Although the attorneys for Petitioners have consented to the *amici's* filing of a joint brief amicus curiae, the *amici* have been advised that the Respondent will not grant its consent.

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,140 newspapers representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Fresno Bee, which employs the petitioners, and sixty other daily newspapers published throughout the state of California hold membership in the ANPA. Concerned with matters of general significance to the profession of journalism and the daily newspaper publishing business, the ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through the ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The ANPA, ASNE and their members are vitally interested in protecting and maintaining the primary function of newspapers: the gathering of information for dissemination to the people. To ensure the free and uncensored flow of information to the public, those engaged in news gathering and reporting must be privileged to hold confidential their sources of information. In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this Court held that the First Amendment did not provide an absolute privilege to newsmen which would permit them to refuse to appear or testify before a grand jury. The holding in that case, however, was a narrow one and did not negate the existence of a qualified privilege which would protect a newsman and his sources in contexts other than grand jury proceedings.

Despite the limited nature of the *Branzburg* decision, several state and federal courts have accorded it an overly-expansive interpretation in denying reporter's assertions of privilege in non-grand jury proceedings. In the case sought to be presented to this Court by Petitioners, the Court of Appeal of the State of California for the Fifth Appellate District, in its majority opinion, erroneously concluded that *Branzburg* "verified that a newsperson would have the same duty to appear at trial pursuant to a subpoena and give what information he possesses." Other cases have similarly extended the narrow holding of *Branzburg* and threaten to completely erode the qualified First Amendment privilege which this Court there recognized. *See, Farr* v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3162 (U.S. Sept. 22, 1975) (No. 75-444); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir. 1974), *petition for cert. dismissed*, 417 U.S. 938 (1974); *United States* v. *Liddy*, 354 F.Supp. 208 (D.D.C. 1972),

motion for stay pending appeal denied, 478 F.2d 586 (D.C. Cir. 1972).

The contempt judgments against petitioners, upheld by the California court below, constitute a serious intrusion upon the qualified privilege which protects a newsman's sources, and the California appellate court's decision demonstrates the misunderstanding which exists as to the very limited scope of the *Branzburg* ruling. That misunderstanding, and decisions resulting from it, will hamper reporters in developing and preserving their sources and thereby frustrate the function of an autonomous and independent press. Only a further decision from this Court, delineating more fully the applicability of the qualified privilege, can eliminate the interference with the free flow of information caused by actual and threatened contempt citations of members of the press.

Because of the importance of the issues sought to be presented to this Court by the Petition for a Writ of Certiorari, the ANPA and ASNE desire to present to this Court, for its assistance, their views in regard to the important issues involved in this proceeding.

WHEREFORE, the American Newspaper Publishers Association and the American Society of Newspaper Editors respectfully request this Court to grant this motion and permit them to file the Joint Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

JOE ROSATO, WILLIAM K. PATTERSON, GEORGE F. GRUNER AND JIM BORT, *Petitioners*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO, *Respondent*

Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the Fifth Appellate District

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JOINT BRIEF OF AMICI CURIAE, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") submit this joint brief amicus curiae in support of Petitioners', Joe Rosato, William K. Patterson, George F. Gruner and Jim Bort, Petition for a Writ of Certiorari.

INTEREST OF THE AMICI CURIAE

As set forth in their motion for leave to file this brief, and as restated herein, the ANPA, ASNE and their members have a significant concern for insuring that the First Amendment's guarantee of a free press shall not be abridged.

The American Newspaper Publishers Association is a nonprofit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,140 newspapers representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Fresno Bee, which employs the petitioners, and sixty other daily newspapers published throughout the state of California hold membership in the ANPA. Concerned with matters of general significance to the profession of journalism and the daily newspaper publishing business, the ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through the ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest.

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its responsibilities in providing an unfettered and effective press in the service of the American people.

The ANPA, ASNE and their members are vitally interested in protecting and maintaining the primary function of newspapers: the gathering of information for dissemination to the people. To ensure the free and uncensored flow of information to the public, those engaged in news gathering and reporting must be privileged to hold confidential their sources of information. In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this Court held that the First Amendment did not provide an absolute privilege to newsmen which would permit them to appear or testify before a grand jury. The holding in that case, however, was a narrow one and did not negate the existence of a qualified privilege which would protect a newsman and his sources in contexts other than grand jury proceedings.

The contempt judgments entered by the respondent court, and affirmed by the California appellate court, represent a serious breach of the limits provided by the First Amendment to prevent the government from interfering with the right to gather and disseminate information guaranteed by that Amendment. Because of the importance of this issue as it relates to the questions sought to be placed before this Court by the Petition for a Writ of Certiorari, ANPA and ASNE desire to present to this Court, for its assistance, their views in regard to the important issues involved in this proceeding.

ARGUMENT

At the outset it must be pointed out that ANPA and ASNE strongly support and adopt the position of the

Petitioners herein. We believe that their brief persuasively and accurately indicates the constitutional infirmity of the truncated due process rights accorded to the Petitioners in the judge-initiated investigative hearing conducted before the Respondent Court. Further, the Petitioners have clearly presented the confused state of the law with regard to those standards which must be applied by trial courts when faced with the "Free Press-Fair Trial" dichotomy.

With reference to the latter issue, your *amici* believe that the standard applied by the majority of the California appellate court was an improper one. That court stated that "the judge need only be satisfied that there is a *reasonable likelihood* of prejudicial news which would . . . tend to prevent a fair trial." 124 Cal. Rptr. at 438-439 (Emphasis supplied). As this Court has recently held, the mere fact that news stories, even prejudicial news stories, are published concerning a defendant is not sufficient by itself to lead to the presumption that a defendant has been deprived of due process. *Murphy* v. *Florida,* —— U.S. ——, 44 L.Ed 2d 589 (1975). That being the law, a trial judge must exercise extreme care in deciding whether or not to issue a "gag order." In making that decision, the judge should first determine whether the potential for prejudicial news coverage poses a "serious and imminent threat to the administration of justice." Even if the judge does so determine, his guidelines for the release or non-release of information must not suffer from vagueness or overbreadth. *See, Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975); *CBS, Inc.* v. *Young,* 522 F.2d 234 (6th Cir. 1975). As the Petitioners have indicated, the Respondent Court failed to

apply the appropriate standard in issuing the orders which led to the contempt judgments at issue.

Your *amici* wish to emphasize the radical departure from *Branzburg* which the decision below represents and the serious infringement of First Amendment rights and privileges which will result if that decision is allowed to stand.

The Decision in Branzburg Provides No Support for the Entry of the Contempt Judgments Below

In *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), for the first time, this Court considered the issue of whether the First Amendment protects newsmen in refusing to reveal a confidential news source or information received from such a confidential source. The resulting opinion of this Court held only that a newsman could be required to appear and testify before a grand jury when the newsman had knowledge of possible criminal conduct which was the subject of the grand jury's inquiry. In so holding, the Court left open the question as to when a newsman's assertion of privilege would be upheld in non-grand jury proceedings, either criminal or civil. The Court repeatedly emphasized that its decision in *Branzburg* was based on the unique function of the grand jury in our society and on the fact that it was information in regard to *criminal* conduct which was being sought. "Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas." 408 U.S. at 691. Moreover, the Court stated that there were limits beyond which even a grand jury could not go in seeking information from newsmen. 408 U.S. at 707-08.

As Justice Powell stated in his concurring opinion:

> "If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."

408 U.S. at 710.

Bearing in mind that *Branzburg* permitted an exception to the newsman's First Amendment privilege primarily because of the overriding interest of the public in acquiring information relating to criminal conduct, it is clear that the court below was in error when it applied the *Branzburg* exception to the petitioners' assertions of privilege. The California appellate court specifically held that the investigative hearings conducted by the Respondent Court had nothing to do with the investigation of possible criminal conduct: "[P]roceedings to investigate violations of court orders instigated by the court itself are not prosecutions of crimes . . ." 124 Cal. Rptr. at 441. "The suggestion of criminal activity was incidental to the accomplishment of the principal objective, and manifestly, an investigation of potential crimes was not the purpose of the investigation . . ." 124 Cal. Rptr. at 451.

Your *amici* do not contend that the Respondent Court lacked authority to conduct the investigative hearings. Since, however, the hearings did not (and, evidently, could not) involve an inquiry into criminal conduct, your *amici* would assert that the *Branzburg* exception was not applicable. There was no public or judicial interest involved which was so substantial as to allow the burden on news gathering and infringement of First Amendment privilege which was imposed by the threat, and eventual fact, of the petitioners' being held in contempt for refusing to answer certain questions directed to them at the investigative hearing.

It is contended that the Respondent Court had a duty to investigate the possible violations of its orders and that in such an investigation the court had the power and authority to utilize its contempt powers to punish newsmen who refused to divulge information concerning the possible violations. Again, your *amici* do not contest the power or duty of the court to conduct such investigations. We do contend, however, that the power of the court to question newsmen in such a proceeding is limited, and that, in the instant case, the Respondent Court exceeded those limitations.

In a Non-Grand Jury Investigation a Newsman's First Amendment Privilege Limits the Scope of Inquiry of the Investigative Body

Two sources for limitations on the scope of inquiry were presented to the court below: a newsman's First Amendment privilege to refuse to disclose sources of confidential information and the California "shield law," California Evidence Code, section 1070. The appellate court held that, in the context of court-instigated investigative hearings such as those conducted

below, the California shield law did not bar the court from asking questions of the newsmen if the answers might reveal that the source of information was an individual directly subject to the trial court's order. It was held, however, that: "The shield law still remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court." 124 Cal. Rptr. at 450.

In regard to the First Amendment privilege the appellate court held that the petitioners were entitled to *no* privilege or protection, basing this holding on the "conclusion that the right to a fair trial outweighed the conditional First Amendment right to refuse to disclose sources" 124 Cal. Rptr. at 443. Although the appellate court recognized that a balancing test was required whenever First Amendment privilege and another constitutional guarantee came into conflict, the court's articulation and application of the balancing test were woefully lacking. Essentially, the court held that, no matter how ephemeral might be the need for protection, a criminal defendant's right to a fair trial will always take "preeminent importance" over the newsman's First Amendment privilege. This approach completely ignores the limited nature of the infringement of privilege sanctioned in *Branzburg*; no inquiry into the essentiality or materiality of the information in the newsman's possession would be required. *See, Brown* v. *Commonwealth,* 204 S.E. 2d 429, 431 (Va.), *cert. denied,* 419 U.S. 966 (1974).

Although in *Branzburg* this Court was unwilling to lay down specific rules concerning "preliminary showings and compelling need" which might be required to allow infringement of a newsman's First Amendment privilege, the Court did indicate that limitations existed, even with regard to grand juries, on the ability and power of investigative bodies to force newsmen to testify. 408 U.S. at 699-700 and 708-09. Such limitations would apply both at the initial stages of any investigative proceeding and at any later point in the proceedings when it appeared that the investigative body was attempting to exceed the boundaries of *Branzburg*. In the case sought to be presented by the Petition for a Writ of Certiorari, the respondent court clearly exceeded those boundaries.

The petitioners herein did answer all questions which sought to discover whether or not the individuals directly subject to the respondent court's gag order had supplied petitioners with a copy of the grand jury transcript or the information contained therein. 124 Cal. Rptr. at 435. Therefore, this Court need not determine the applicability of the newsman's First Amendment privilege when a reporter refuses to reveal the identity of an individual who has violated a court order to which the individual was subject. Assuming that the investigative proceeding initiated by the respondent court was appropriate and that it was permissible to require reporters to answer certain questions in such a proceeding, the issue presented for this Court's consideration relates to the point at which the limits of the First Amendment will foreclose further inquiry. Your *amici* believe that the respondent court exceeded those limits.

Once the respondent court had received assurances, both from the "court officers" and from petitioners,

that no "court officer" had been the source of the information published, the court's power to make further inquiry of petitioners was at an end. The power to investigate enforced by the contempt power may be a necessary component of a court's authority and power to enforce "gag orders" which it issues; however, once it is clear that no one directly subject to such an order has violated the order, the necessity for the power ceases. It must cease when further use of the power would infringe First Amendment rights and privileges, since there no longer exists the "adequate foundation for inquiry" or the "existing need" for disclosure which might allow infringement of the First Amendment interests at stake. *See, Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *DeGregory* v. *New Hampshire Attorney General*, 383 U.S. 825 (1966).

In *DeGregory, supra*, Mr. DeGregory appeared in investigative proceedings being conducted by the New Hampshire Attorney General. Those proceedings had been initiated for the purpose of discovering whether or not subversive activities were then being engaged in within the state. Mr. DeGregory was willing to answer questions concerning his relationship with and knowledge of Communist activities since 1957 (the hearings were conducted in 1963), and in fact he did answer the questions. He refused, however, to answer questions concerning earlier periods and was therefore found in contempt and committed to jail. On his appeal to this Court, the judgment was reversed. This Court held that there had been no showing of a present danger of sedition against the state of New Hampshire itself, and, therefore New Hampshire's interest was "too remote and conjectural to override the guarantee of the First

Amendment that a person can speak or not, as he chooses, free of all governmental compulsion." 383 U.S. at 830. *See also, Watkins* v. *United States*, 354 U.S. 178 (1957); *United States* v. *Rumely*, 345 U.S. 41 (1953).

By answering the initial questions propounded to him, DeGregory indicated that he had no knowledge of present Communist activities in New Hampshire. Thereafter, he could not be forced to answer any other questions not directly related to the scope of the attorney general's inquiry: *i. e.*, current subversive activity in the state. Similarly, the petitioners herein answered all of the initial questions which sought to discover whether one of the "court officers" had been the source for the information published. As in *DeGregory*, all other questions asked of petitioners went beyond the scope of the respondent court's inquiry: *i. e.*, whether a "court officer" had violated the "gag order." Utilization of the contempt power to force petitioners to answer those additional questions clearly infringed the newsman's First Amendment privilege and exceeded the limitations on inquiry which that privilege and the *Branzburg* decision impose.

It is respectfully submitted that the contempt judgments entered by the respondent court present to this Court serious violations of the constitutional guarantee of a free press. Moreover, the California appellate court's opinion, affirming fifty-five of those judgments, demonstrates a crucial misreading and misunderstanding of the narrow scope of the decision rendered in *Branzburg* v. *Hayes*. If the courts of this land are allowed to continue in the mistaken belief that *Branzburg* sanctions the forced disclosure of sources and

information by newsmen in any and every investigative proceeding, the ability and the right of the press to engage in news-gathering and dissemination of information to the public, as contemplated by the First Amendment, will be destroyed.

CONCLUSION

It is respectfully urged that this Court grant the petition for writ of certiorari in order that the substantial constitutional questions raised therein can be fully examined.

Respectfully submitted,

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In the Supreme Court of the United States

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IN AND FOR THE COUNTY OF FRESNO,
Respondent.

Reply Brief of Petitioners

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO,

Respondent.

Reply Brief of Petitioners

This brief is submitted by way of reply to respondent's "Brief in Opposition to Petition for Writ of Certiorari."

At the outset this Court should note that respondent has obscured and distorted a key fact in referring to the events which transpired below by suggesting that the trial court's inquiry was limited to determining whether court officers had violated a protective order. The questioning of petitioners at the hearings below was, in reality, far more extensive in scope because it explored possible non-officer sources. Petitioner Rosato, for example, was asked when

he gained possession of the grand jury transcript. Rosato question no. 16, Pet. for Cert., App. p. 243. Petitioner Patterson was required to state whether *The Fresno Bee* obtained one or more copies of the grand jury transcript "from outside sources." Patterson question no. 13, *Id.*, p. 244. Petitioner Gruner was asked which *Bee* employee obtained a copy of the transcript. Gruner question no. 4, *Id.*, p. 246. Answers to these and similar questions would tend to pinpoint the time and place of the rendezvous and the name of the reporter who made contact with the source. The field of inquiry would be so limited by such questioning that the source's identity could be divined by guesswork, thus enabling respondent to accomplish by indirection what no reviewing court would permit it to do directly.

Moreover, petitioners reject the proposition that investigating court order violations is superior to the protection of confidential news sources even if such inquiry does not exceed those narrow bounds. We submit that respondent's stated objective at the hearings below was nothing more than an excuse for abridging otherwise unassailable First Amendment freedoms.

THE FIRST AMENDMENT PRIVILEGE MUST BE RECOGNIZED HERE

Broadly read, the issue before this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), was whether and to what extent reporters should answer questions relevant to the commission of crime. 408 U.S. at 683. The California Court of Appeals has clearly excepted the case at bench from the application of the *Branzburg* rule by finding that the hearings below were not an investigation into crime. *Rosato v. Superior Court*, 51 Cal.App.3d 190, 227, 124 Cal.Rptr. 427, 451 (1975).

On the one hand, for this Court to recognize petitioners' claim of a First Amendment privilege would in no way conflict with any of the theoretical bases for the holding in *Branzburg*. The functioning of the grand jury was in no way impeded and these reporters have withheld no information relevant to the investigation or prosecution of criminal defendants. On the other hand, for this Court to deny the petition for certiorari in this nationally-publicized case would enshrine a precedent which is crippling to press freedom everywhere. It was a confidential news source which enabled petitioners to obtain information about a conflict of interest prior to the approval of an important public contract. When the government itself is corrupt, the public has only the media and the courts to look after its interests.

The ability to protect his sources is a reporter's most valuable tool, and if he can be compelled to disclose a news source in a non-criminal setting such as that below, neither reporter nor source will hereafter be secure in the knowledge that the law will respect their confidential relationship. The devastating impact this uncertainty will have upon the reporting of news is impossible to gauge, but it is a certainty that in this age of widespread malfeasance in public office, any further shackling of the press is not in the public interest.

Respondent failed to discuss the *Branzburg* rule while asserting that the state court's holding was an adequate state ground dispositive of the First Amendment privilege claim. Resp. Brief, p. 12. This is absurd. State power cannot be used as an instrument for circumventing a federally-protected right. *Gomillion v. Lightfoot*, 364 U.S. 346, 347 (1960).

THE GAG ORDER ENTERED BELOW WAS INVALID; THE ISSUE OF GAG ORDER STANDARDS MUST BE RESOLVED

Respondent has conceded that its review of the relevant gag order standards cases was only "cursory." Resp. Brief, p. 6. We submit that its attempt to harmonize the diverse approaches of the many courts which have addressed this issue is in a similar vein. There is no uniform rule as to the degree of potential interference with the administration of justice that is necessary to justify a restriction upon speech. *CBS, Inc. v. Young,* 522 F.2d 234 (6th Cir. 1975) disproves respondent's cumbersome and confusing distinction. Respondent's brief has also ignored the fact that some courts have formulated other tests conforming neither to the "clear and present danger" standard nor to the "reasonable likelihood" test. See, *e.g., Farr v. Pitchess,* 522 F.2d 464, 468 (9th Cir. 1975); *Commonwealth v. Lucchese,* 335 A.2d 508, 511 (Pa. Super. 1975). Whatever the proper standard may be, however, respondent's gag order is invalid when tested by the very standard approved by the Court of Appeals below.

Petitioners submit that the standards question is a latent issue in *Nebraska Press Association v. Hugh Stuart,* cert. granted, No. 75-817. In entering its restrictive order, the trial court in Lincoln County, Nebraska, found that there was a "reasonable likelihood of prejudicial publicity which would make difficult, if not impossible, the impaneling of an impartial jury" in the Simants murder case. Quoted from Brief of Petitioners in *Nebraska Press Association, supra,* p. 7. As noted in our petition for certiorari, the "reasonable likelihood" standard has only been followed by one of the Federal Courts of Appeal which have addressed the issue, and is, therefore, a minority rule.

The point is that the present proliferation of gag orders and court rules which prohibit the exercise of basic First Amendment rights is taking place without any direction from this Court as to what standards, if any, should be considered in the drafting of those orders and rules so as to protect constitutional rights. It is evident that no standard was observed by respondent in formulating its protective orders and, we submit, that disregard for First Amendment rights invalidated those orders.

THIS CASE SHOULD BE CONSOLIDATED WITH NEBRASKA PRESS ASSOCIATION

As we have earlier noted, the grant of certiorari by this Court in *Nebraska Press Association, supra,* will not resolve the so-called "free press—fair trial" conflict if that case is heard alone or not consolidated with this case. Direct restraints upon the press are the exception rather than the rule when gag orders are imposed in criminal proceedings. By far the most widespread constitutional crisis which has resulted from the proliferation of gag orders and gag rules is the impingement upon news reporting by the gagging of news sources. By their routine use of "source constraint" protective orders, trial courts achieve by indirection the same stifling of news reporting that Judge Stuart accomplished in the *Nebraska Press Association* case with his direct restraint of the media.

This Court has traditionally been less concerned with form than substance. *United States v. New York, N.H. & H.R. Co.,* 355 U.S. 253, 263 (1957). In practical effect, an order prohibiting comment by a court officer or participant is not really designed to prevent such individual's chance disclosure of information covered by the order to his spouse or neighbor. Because it is from the press that a

prospective juror would be more likely to learn about a pending proceeding, it is the press which is the real target of gag orders, and it is the First Amendment rights of the press which are being sacrificed for judicial efficiency. See generally, Robert S. Warren and Jeffrey M. Abell, "Free Press—Fair Trial: The 'Gag Order,' A California Aberration," 45 So.Cal.L.Rev. 51, 74-77 (1972). Accordingly, this Court should cut through the semantic disguises and treat source constraints as, in actual effect, prior direct restraints upon the press.

We urge this Court to grant our petition and to consolidate this case for argument with *Nebraska Press Association* so that the real "First Amendment versus Sixth Amendment" crisis in our courts will be met with the formulation of a uniform national rule. The grant of certiorari in *Nebraska Press Association* recognized not only the importance of the issues there presented, but, also, that the lower courts have explored the subject matter and have experimented with diverse standards for the issuance and form of restrictive orders without settling the controversy. The present petition also presents issues of equal importance raised by the manner of trial court enforcement of source constraints. We submit that all these issues of recognized importance are now ripe for review by this Court.

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